Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Jerry O'Neil, on behalf of Himself, His Clients and His Constituents,
Petitioners.

v.

Montana Supreme Court Commission on the Unauthorized Practice of Law and the Montana Supreme Court,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

PETITIONERS' APPENDIX

Jerry O'Neil
985 Walsh Road
Columbia Falls, Montana 59912
406-892-7602; 406-892-7603 fax
Representing himself

January _____, 2007

PETITIONER'S APPENDIX
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OPINION

No. 04-857

IN THE SUPREME COURT OF THE STATE OF MONTANA

2006 MT 284

MONTANA SUPREME COURT
COMMISSION ON THE
UNAUTHORIZED PRACTICE OF LAW,
Petitioner and Respondent,

v.

JERRY O'NEIL, on Behalf of Himself,
His Clients, and His Constituents,
Respondent and Appellant,

v.

THE MONTANA STATE BAR ASSOCIATION,
Defendant and Respondent.

APPEAL FROM: The District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV 02-378B,
Honorable Deborah Kim Christopher, Presiding Judge

COUNSEL OF RECORD:

For Appellant:
Jerry O'Neil (pro se), Columbia Falls, Montana

For Respondent Montana Supreme Court Commission on the Unauthorized Practice of Law:
David A. Hawkins, Attorney at Law, Helena, Montana

For Respondent Montana State Bar Association:
Stephen C. Berg, Johnson, Berg, McEvoy & Bostock, Kalispell, Montana
Betsy Brandborg, Attorney at Law, Helena, Montana

For Amicus Curiae:
The Honorable Mike McGrath,
Montana Attorney General,

Anthony Johnstone, Assistant Attorney General, Helena, Montana

Submitted on Briefs: April 5, 2006
Decided: November 8, 2006

Filed: November 8, 2006

s/ Ed Smith
Clerk

Justice James C. Nelson delivered the Opinion of the Court.
¶1 The Montana Supreme Court Commission on the Unauthorized Practice of Law (the Commission) filed a Petition for Finding Civil Contempt and for Permanent Injunction against Jerry O'Neil (O'Neil). O'Neil filed a counterclaim against the Commission along with a third-party complaint against the State Bar of Montana (the Bar)[1] alleging defamation, tortious interference with contract and violation of his, his customers' and his constituents' rights to privacy. Prior to trial, the District Court for the Eleventh Judicial District, Flathead County, granted the Bar's Motion for Summary Judgment on O'Neil's third-party complaint against the Bar. The court also granted the Commission's Motion for Summary Judgment on O'Neil's counterclaim against the Commission, but denied the

[1]O'Neil erroneously denominated his action against the Bar as a counterclaim. However, since the Bar was not a party to the original action, O'Neil's claim against the Bar was actually a third-party complaint and will be referred to as such throughout this Opinion.

Commission's Motion for Summary Judgment on the issue of whether O'Neil engaged in the unauthorized practice of law. Following a bench trial, the court entered its Judgment and Permanent Injunction finding O'Neil in contempt and enjoining him from practicing law.

¶2 O'Neil appeals the District Court's judgment as well as the court's grants of summary judgment to the Commission and to the Bar. O'Neil also challenges the constitutionality of §§ 37-61-201 and -210, MCA. We affirm.

¶3 We address the following issues on appeal:

¶4 1. Whether O'Neil's third-party complaint against the Bar was timely filed.

¶5 2. Whether the District Court erred in granting the Bar's and the Commission's Motions for Summary Judgment.

¶6 3. Whether the District Court abused its discretion in denying O'Neil a jury trial.

¶7 4. Whether §§ 37-61-201 and -210, MCA, are constitutional as applied by the District Court.

¶8 5. Whether the District Court erred in finding that O'Neil engaged in the unauthorized practice of law.

Factual and Procedural Background

¶9 O'Neil is not, and never has been, licensed to practice law in the State of Montana. He has not attended law school; he has not sat for the Montana bar examination; and he has not met the Montana Supreme Court's character and fitness requirements. O'Neil is not licensed to practice law in any state of the United States. O'Neil served as a Montana State Senator in the 2001, 2003 and 2005 legislative sessions.

¶10 O'Neil advertised in the Greater Flathead Valley CenturyTel telephone book as an "independent paralegal" under the "Attorney" heading in the yellow pages. The advertisement included the statements that he is "Licensed to Practice Law in Blackfeet Tribal Court" and that he is a "MEMBER: Child & Family Section of the Montana State Bar."

¶11 On February 13, 2001, Eleventh Judicial District Court Judges Ted Lympus, Katherine Curtis and Stewart Stadler wrote the Commission to complain that O'Neil may be engaged in the unauthorized practice of law. The Judges asked the Commission to investigate O'Neil's actions.

¶12 The Commission had received other information prior to this time to the effect that O'Neil's actions may constitute the unauthorized practice of law. In June 1998, Judge Lympus wrote to then Montana Supreme Court Chief Justice J. A. Turnage concerning O'Neil's efforts to represent one of the parties in a dissolution proceeding before the District Court. In February and March 2000, a social worker with Adult Protective Services complained to the Commission that O'Neil was attempting to offer legal advice to an incapacitated individual for whom the social worker was acting as a guardian. O'Neil was purportedly acting on behalf of the incapacitated individual's ex-wife, against whom a restraining order had been issued. In January 2001, a member of the Commission received a transcript sent at the request of Sixteenth Judicial District Court Judge Joe Hegel. The transcript reflected that O'Neil assisted one of the parties in a dissolution proceeding by preparing dissolution materials.

¶13 On May 16, 2001, Commission Chair John Connor wrote O'Neil asking for a detailed description of the services O'Neil provided and the duties that he performed on behalf of his customers. In his letter, Connor warned O'Neil that if he was engaged in the unauthorized practice of law, he may be subject to civil complaint and criminal prosecution. O'Neil's reply acknowledged Connor's request for information, but failed to actually provide the requested information. Connor sent a second letter to O'Neil on September 28, 2001, informing him that the Commission would be conducting an investigation to determine whether O'Neil was engaged in the unauthorized practice of law. In his October 9, 2001 reply, O'Neil engaged in

a tirade against the Commission stating, "If your object is to try me without a jury, you had better bring along your chains and restraints."

¶14 On April 25, 2002, Connor again wrote O'Neil explaining that, based upon its investigation to date, the Commission had determined that there was probable cause to believe that O'Neil was engaged in the unauthorized practice of law. In his letter, Connor directed O'Neil to cease and desist from all such activities. Connor further stated that if the Commission did not receive a written assurance of compliance from O'Neil, it would pursue appropriate legal action against him.

¶15 Because O'Neil failed to provide the written assurance requested, the Commission filed its Petition for Finding of Civil Contempt and for Permanent Injunction on July 15, 2002. The Prayer for Relief requested that O'Neil be found in civil contempt for engaging in the unauthorized practice of law and that the District Court issue a permanent injunction prohibiting O'Neil from engaging in such conduct.

¶16 On November 19, 2002, O'Neil filed a counterclaim against the Commission and a third-party complaint against the Bar, alleging defamation, tortious interference with contract and violation of his, his customers' and his constituents' rights to privacy. O'Neil also demanded a jury trial. O'Neil's actions against the Bar and the Commission were based on the following facts.

¶17 On November 15, 2000, Bar general counsel Betsy Brandborg received a telephone call from Julia Thomason at U.S. West Dex asking if O'Neil was a licensed attorney and, if not, why he was listed under the "Attorney" heading in the Yellow Pages. Brandborg explained that O'Neil was not a licensed attorney with the Bar. Thomason requested a letter confirming that information and suggested that Brandborg also request that O'Neil's name be removed from the "Attorney" section of the Yellow Pages. Brandborg wrote the following

letter and sent a copy to O'Neil:

> I have noticed that Jerry O'Neil's "Independent Paralegal" advertisement is included under the attorney listing in the yellow pages. Jerry O'Neil is not an attorney. In spite of his representation to the contrary, Jerry O'Neil is not a member of the State Bar of Montana. I request that you remove Jerry O'Neil's listing from the attorney section of the yellow pages.

¶18 On November 23, 2000, O'Neil wrote a letter in reply claiming that he was an attorney duly licensed by the Blackfeet Tribal Court and the Confederated Salish and Kootenai Tribal Court (CS&K Tribal Court). Upon receiving this information, Brandborg called the CS&K Tribal Court and learned that while O'Neil was licensed as an attorney in that court, they had based that licensure upon O'Neil's representation that he was licensed as an attorney in the Blackfeet Tribal Court. Brandborg next called the Blackfeet Tribal Court and learned that O'Neil was a licensed lay advocate with that court, not an attorney. Thereafter, Brandborg called the CS&K Tribal Court and conveyed the information she had obtained from the Blackfeet Tribal Court that O'Neil was not a licensed attorney with that court. The CS&K Tribal Court subsequently terminated O'Neil's license to practice before that court.

¶19 Brandborg wrote a second letter to Thomason at U.S. West Dex, dated December 5, 2000, to clarify the Bar's position. This letter read in pertinent part:

> As I indicated earlier, Jerry O'Neil is not an attorney, i.e., he has not given the State Bar of Montana any information indicating that he has graduated from an ABA accredited law school, taken Montana's bar examination, or been admitted to the State Bar of Montana as a member of the State Bar of Montana. Mr. O'Neil is an associate member of the Family Law

> Section of the State Bar of Montana. In accord with Article 1, Section 3 of our by-laws, the fact of Mr. O'Neil's associate membership with the Family Law Section does not mean Mr. O'Neil can claim membership in the State Bar of Montana.
>
> As to Mr. O'Neil's status with the Tribal Courts, it is appropriate for your business to check with them. . . .

Brandborg did not convey this letter or the November 15, 2000 letter to the Tribes nor did she write to either Tribe confirming the information in the telephone calls.

¶20 On September 10, 2004, the Bar filed its Motion for Summary Judgment arguing that it was entitled to judgment as a matter of law because none of O'Neil's three claims for relief against the Bar satisfied the necessary elements of the law to state a claim. On September 14, 2004, the Commission filed its Motion for Summary Judgment also arguing that it was entitled to judgment as a matter of law because none of O'Neil's claims against the Commission satisfied the necessary elements of the law to state a claim. In addition, the Commission asserted that it was also entitled to judgment as a matter of law on its Petition for Finding of Civil Contempt and for Permanent Injunction against O'Neil.

¶21 The District Court subsequently dismissed O'Neil's third-party complaint against the Bar as untimely filed. In its November 16, 2004 Order granting the Bar's Motion for Summary Judgment, the District Court concluded that the third-party complaint was filed more than 30 days after the Commission filed its petition and that O'Neil had not obtained leave from the court or the parties to file the third-party complaint after the 30 days in violation of M. R. Civ. P. 14(a).

The court also ruled that O'Neil's claim of defamation against the Bar failed as a matter of law under § 27-2-204(3), MCA, because it was filed more than two years after the event triggering the claim, namely, the November 15, 2000 letter from Brandborg to U.S. West Dex. Moreover, the court ruled that the Bar was entitled to judgment as a matter of law because none of O'Neil's claims against the Bar satisfied the necessary elements of the law to state a claim.

¶22 On November 24, 2004, the District Court denied the Commission's Motion for Summary Judgment on its Petition for Finding of Civil Contempt and for Permanent Injunction against O'Neil and granted the Commission's Motion for Summary Judgment as to O'Neil's counterclaim against the Commission. The court ruled that there remained genuine issues as to the material facts regarding O'Neil's practice of law as alleged in the Commission's petition, thus summary judgment on that issue was not appropriate. The court dismissed O'Neil's counterclaims against the Commission with prejudice because the Commission is immune from suit under Montana Commission on the Unauthorized Practice of Law (M.C.U.P.L.) Rule 10, and because none of O'Neil's claims against the Commission satisfied the necessary elements of the law to state a claim.

¶23 Following a two-day trial, the District Court entered its Judgment and Permanent Injunction finding O'Neil in contempt for engaging in the practice of law when he is not authorized to do so and permanently enjoining him from engaging in the practice of law "until such time as he becomes duly authorized."

¶24 O'Neil appeals the Judgment and Permanent Injunction along with the District Court's grants of summary judgment to the Bar and to the Commission. The Bar and the Commission jointly filed a response brief on appeal.

Standard of Review

¶25 We review a district court's decision to grant summary judgment de novo. *Watson v. Dundas*, 2006 MT 104, ¶ 16, 332 Mont. 164, ¶ 16, 136 P.3d 973, ¶ 16 (citing *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 18, 321 Mont. 99, ¶ 18, 90 P.3d 381, ¶ 18). In doing so, we apply the criteria contained in M. R. Civ. P. 56©, which provides that the moving party must establish both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Watson*, ¶ 16 (citing *Grimsrud v. Hagel*, 2005 MT 194, ¶ 14, 328 Mont. 142, ¶ 14, 119 P.3d 47, ¶ 14). The burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue of material fact does exist. *Watson*, ¶ 16.

¶26 In addition, we review a district court's findings of fact to determine if they are clearly erroneous. *Watson*, ¶ 17 (citing *Ramsey v. Yellowstone Neurosurgical Assocs.*, 2005 MT 317, ¶ 13, 329 Mont. 489, ¶ 13, 125 P.3d 1091, ¶ 13). To make that determination, we use the following three-part test: (1) whether the findings are supported by substantial evidence; (2) whether the trial court has misapprehended the effect of the evidence; and (3) whether a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed. *Watson*, ¶ 17. We review a district court's conclusions of law for correctness. *Watson*, ¶ 17 (citing *Galassi v. Lincoln County Bd. of Com'rs*, 2003 MT 319, ¶ 7, 318 Mont. 288, ¶ 7, 80 P.3d 84, ¶ 7).

Issue 1.

¶27 Whether O'Neil's third-party complaint against the Bar was timely filed.

¶28 The Commission filed its Petition for Finding of Civil Contempt and for Permanent Injunction on July 15, 2002. O'Neil filed his Answer to Petition and Demand for Jury Trial on August 2, 2002. O'Neil did not file his counterclaim against

the Commission and his third-party complaint against the Bar until November 19, 2002.

¶29 In its Findings of Fact, Conclusions of Law, and Order Regarding State Bar of Montana's Motion for Summary Judgment, the District Court ruled that O'Neil's third-party complaint was untimely under M. R. Civ. P. 14(a), which requires leave of all parties to the action for the filing of a third-party complaint if the third-party complaint is not filed within 30 days after serving the original answer. Here, O'Neil's third-party complaint was filed more than 30 days after he filed his answer. Nevertheless, O'Neil's third-party complaint would be considered timely if the parties to the action agreed to the late filing. *See* M. R. Civ. P. 14(a).

¶30 O'Neil contends that for all practical purposes the Commission is identical in interest and standing in this case to the Bar, thus his third-party complaint against the Bar was timely filed along with his counterclaim against the Commission. Moreover, he asserts that his counterclaim against the Commission and his third-party complaint against the Bar were incorporated in his original answer filed on August 2, 2002, wherein he stated:

> Respondent respectfully prays the Court for the following relief:
>
> . . . .
>
> 2. For all the relief requested in the Cross-claim to be filed in this cause to be incorporated by such filing in this Response by reference . . . .

¶31 Contrary to O'Neil's assertions, the Commission and the Bar are not the same entity. The Bar is a membership organization unified by the Montana Supreme Court

> to aid the courts in maintaining and improving the

> administration of justice; to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar . . . and to insure that the responsibilities of the legal profession to the public are more effectively discharged.

Supreme Court Order Unifying the State Bar, No. 12616 (1974). The Commission, on the other hand, is a nine-member investigative committee composed of practicing lawyers and non-lawyers appointed by this Court and charged with the duty to protect the public interest by investigating complaints of unauthorized practice of law. M.C.U.P.L. Rules 1(a), 1© and 3(a).

¶32 Consequently, O'Neil's contention that he did not need to meet the 30-day requirement in M. R. Civ. P. 14(a) for third-party complaints because the Bar and the Commission are the same entity is without merit.

¶33 O'Neil also contends that he had the District Court's express permission for the late filing rendered orally from the bench and that the Commission and the Bar agreed not to pursue any Rule 14 claims and to allow O'Neil to file the third-party complaint against the Bar.

¶34 The transcript of the October 28, 2004 pretrial conference and hearing on the Motions for Summary Judgment indicates that the following colloquy occurred:

> MR. O'NEIL: . . . I don't believe we need to have a special rule from the Court to serve that [third-party complaint]. But if we do I would request the Court to give us one retroactive in order to conserve the resources of the Court so we don't have to go back and litigate it over again.
>
> As far as the –

THE COURT: If that's an issue before the Court, then, Mr. Berg, Mr. Hawkins, do you wish to take a position on that?

MR. BERG [Counsel for the Bar]: Judge, for the State Bar it is an issue. It is purely procedural. We are way down the line for it. We are approaching trial. We don't want to make it a substantive issue. We don't want this case to ride on that and find ourselves here in six months.

THE COURT: So you object to the filing –

MR. BERG: I will not object to what he is basically asking of us, which is that we waive the –

THE COURT: 30 days.

MR. BERG: Yes.

THE COURT: All right. And then, Mr. Hawkins?

MR. HAWKINS [Counsel for the Commission]: I'd agree.

THE COURT: And, sir, based on the lack of objection from the other two parties, then I will allow you to file the document that you wish to file.

¶35 Based on the foregoing, it appears that the District Court and the parties agreed to allow O'Neil to file his third-party complaint against the Bar even though it was not filed within the time prescribed by M. R. Civ. P. 14(a).

¶36 Accordingly, we hold that the District Court erred in dismissing O'Neil's third-party complaint in part because it was untimely. Although we have determined that the District Court erred on this issue, it is not necessary to remand for further proceedings since the District Court also entered findings of fact and conclusions of law on the merits of O'Neil's third-party complaint against the Bar sufficient for this Court to consider on appeal and we affirm on those issues.

Issue 2.

¶37 *Whether the District Court erred in granting the Bar's and the Commission's Motions for Summary Judgment.*

¶38 O'Neil asserted three claims for relief against the Bar and the Commission: defamation, tortious interference with contract and privacy. The defamation claim is based on the letters written by Brandborg to U.S. West Dex. The tortious interference claim involves those same letters and alleges that the Bar and the Commission wrongfully interfered with O'Neil's contracts with U.S. West Dex and with the tribal courts and injured his ability to earn an income. As to the privacy claim, O'Neil alleges that the conduct of the Bar and the Commission violated his, his customers' and his constituents' rights to individual privacy "by interfering with their discussion and disclosure of matters involving the preparation and strategy of their personal and legal matters with whom they choose."

¶39 First, we agree with the District Court that the claims against the Commission are barred as the Commission has immunity from litigation when exercising its functions. To that end, M.C.U.P.L. Rule 10 provides:

> In exercising its functions and powers, the commission, its members, employees and all personnel through whom the commission functions shall enjoy such judicial immunities as the Montana Supreme Court would enjoy if performing the same functions.

¶40 The judicial immunities enjoyed by the Montana Supreme Court (and, pursuant to M.C.U.P.L. Rule 10, by the Commission) are set forth in § 2-9-112, MCA,[2] which provides:

---

[2]O'Neil raised no challenge to this statute.

(1) The state and other governmental units are immune from suit for acts or omissions of the judiciary.
(2) A member, officer, or agent of the judiciary is immune from suit for damages arising from his lawful discharge of an official duty associated with judicial actions of the court.
(3) The judiciary includes those courts established in accordance with Article VII of the Constitution of the State of Montana.

¶41 Second, O'Neil provides no evidence to suggest that the Commission was involved in writing the letters to U.S. West Dex or in representing to the CS&K Tribal Court that O'Neil was not an attorney. Consequently, O'Neil's claims against the Commission for defamation and for tortious interference fail as a matter of law.
¶42 Third, O'Neil's claims against the Bar for defamation and for tortious interference and against both the Bar and the Commission for invasion of privacy also fail as a matter of law. The reasons for this determination are set forth below.

Defamation

¶43 In its November 16, 2004 Order granting the Bar's Motion for Summary Judgment, the District Court determined that O'Neil's claim of defamation against the Bar failed as a matter of law because it was filed more than two years after the event triggering the claim, namely, Brandborg's November 15, 2000 letter to U.S. West Dex. The District Court correctly cited § 27-2-204(3), MCA, which provides that "[t]he period prescribed for the commencement of an action for libel, slander, assault, battery, false imprisonment, or seduction is within 2 years." Here, O'Neil did not file his third-party complaint against the Bar until November 19, 2002, two years and four days after the November 15, 2000 letter.

¶44 O'Neil's argument that his third-party complaint against the Bar was timely because it was incorporated in his August 2, 2002 answer to the Commission's petition, is without merit. As we have already stated, the Bar and the Commission are two separate entities. Consequently, the Bar did not become a party to these proceedings until O'Neil filed his third-party complaint on November 19, 2002. M. R. Civ. P. 3 provides that "[a] civil action is commenced by filing a complaint with the court." Hence, the statute of limitations on O'Neil's defamation claim did not toll until the complaint was filed, four days too late. This Court has held that neither ignorance of the law nor the need for time to present a *pro se* case constitutes an adequate excuse to disregard a state of limitations. *Columbia Falls. In re Petition of Gray*, 274 Mont. 1, 2, 908 P.2d 1352, 1352 (1995).

¶45 Accordingly, we hold that the District Court did not err in granting summary judgment to the Bar on O'Neil's defamation claim.

Tortious Interference

¶46 O'Neil contends that the Bar wrongfully interfered with his contract with "outside jurisdictions and businesses" and injured his ability to earn an income. O'Neil also argues that the District Court failed to consider Brandborg's "false" notification to the CS&K Tribal Court that O'Neil was not licensed to practice law before the Blackfeet Tribal Court and that the CS&K Tribal Court terminated O'Neil's right to practice before them because of Brandborg's representations.

¶47 The Bar contends that in order to assert a prima facie claim of tortious interference, O'Neil must show that it "intentionally committed a wrongful act without justification or excuse." *Richland Nat. Bank & Trust v. Swenson*, 249 Mont. 410, 419, 816 P.2d 1045, 1051 (1991). Hence, the Bar claims that O'Neil must show that the Bar's acts were: (1) intentional and willful; (2) calculated to cause damage to O'Neil in his business; and (3)

done with the unlawful purpose of causing damage or loss without justifiable cause on their part. *Pospisil v. First Nat. Bank of Lewistown*, 2001 MT 286, ¶ 13, 307 Mont. 392, ¶ 13, 37 P.3d 704, ¶ 13.

¶48 Here, Brandborg's letters to U.S. West Dex and representations to the CS&K Tribal Court were not "wrongful" acts, nor were they committed "without justification or excuse." Brandborg and the Bar have a responsibility to tell the truth regarding the status of those admitted or not admitted to practice law in this State. Moreover, Brandborg only reported what the Blackfeet Tribal Court told her regarding O'Neil's status with the Tribe, that O'Neil is a lay advocate, not an attorney. As the Bar points out in its brief on appeal, the social interests in protecting the freedom of action of the Bar to tell the truth outweigh O'Neil's claimed right to misrepresent his status as a licensed attorney to the public. As stated in ¶ 31 of this Opinion, the mission of the Bar includes, among other things, the obligation to foster high standards of integrity, learning, competence, public service and conduct on the part of those who are engaged in the practice of law and, concomitantly, to protect the public from those who do not meet their standards.

¶49 Accordingly, we hold that the District Court did not err in granting the Bar's Motion for Summary Judgment on this issue.

Privacy

¶50 O'Neil contends that the Bar and the Commission violated his, his customers' and his constituents' rights to privacy as guaranteed by Article II, Section 10, of the Montana Constitution, which provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." O'Neil claims that the conduct of the Bar and the Commission "violates his customers' rights to individual privacy by

interfering with their discussion and disclosure of matters involving the preparation and strategy of their personal and legal matters with whom they choose."

¶51 The Bar and the Commission assert that O'Neil's claim of protection for his customers and his constituents fails as O'Neil has no standing to assert a violation of another person's right to privacy. O'Neil claims, on the other hand, that he has the same standing to argue the privacy rights of his customers as the physicians in *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, had to argue the privacy rights of their patients. We disagree.

¶52 This Court did hold in *Armstrong* that healthcare providers have standing to assert the individual privacy rights of their women patients to obtain a pre-viability abortion from a healthcare provider of their choosing. We did so because of the closeness of the relationship between the women patients and their healthcare providers. *Armstrong*, ¶¶ 9-13. We stated in *Armstrong* that "[a]side from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Armstrong*, ¶ 10.

¶53 Lost in O'Neil's reliance on our decision, however, is a critical distinction between his situation and the healthcare providers in *Armstrong* who we determined to have representational standing to represent the individual privacy and autonomy interests of their patients. *Armstrong*, ¶¶ 2-13. In that case, the physician assistants and the physicians were all licensed by the State Board of Medical Examiners to perform the medical procedures and to render the medical services implicated in the statutory scheme that was at issue in that case. *Armstrong*, ¶¶ 1, 63-64. Thus, there was an intimate nexus between the patients' individual privacy and autonomy right to obtain a lawful medical procedure from their chosen, *licensed* healthcare provider. The licensed healthcare providers had as

much an interest in protecting autonomy and individual privacy implicit in the provider/patient relationship, as did the patients themselves because the State licensing authority permitted this relationship to exist. *Armstrong*, ¶ 58.

¶54 This Court did not, however, hold in *Armstrong* that a patient has any individual privacy right to obtain medical services from one *not* licensed by the State Board of Medical Examiners to perform the services at issue. *See Armstrong*, ¶¶ 59-62.

¶55 The point to be noted is that O'Neil is *not* licensed to practice law. *See* § 37-61-201, MCA. He performs paralegal services. *See* § 37-60-101(12), MCA. O'Neil cannot enter into an attorney/client relationship, because he is not an attorney. Whether O'Neil's customers reveal private personal and legal matters to him in his capacity as a paralegal is beside the point. What is at issue here is O'Neil practicing law when he is not licensed to do so. His customers have no privacy right in seeking from O'Neil legal services which he is not licensed to perform. And, O'Neil has no representational standing to assert on behalf of his customers a privacy right that, by law, does not exist.

¶56 The Bar and the Commission also argue that there is no private right of action against a non-governmental entity. They maintain that the privacy section of the Montana Constitution contemplates privacy invasion by state action only. On the contrary, we stated in *Armstrong* that

> Article II, Section 10 of the Montana Constitution was intended by the delegates to protect citizens *from illegal private action* and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private.

Armstrong, ¶ 35 (emphasis added).

¶57 Finally, we also hold that O'Neil's own right to privacy has not been violated in this case. O'Neil's advertisements in the Yellow Pages imply that he is a member of the Bar. The Bar's clarification of his lay status in conversations with the Tribes and correspondence with U.S. West Dex does not fall into the category of intruding into O'Neil's "private activities." No person has a privacy interest to misrepresent himself to the public as a licensed professional when he is not. Indeed, it is O'Neil's activities that he advertises to the public that are in question.

¶58 Accordingly, we hold that the District Court did not err in granting the Bar's and the Commission's Motions for Summary Judgment on this issue.

Issue 3.

¶59 *Whether the District Court abused its discretion in denying O'Neil a jury trial.*

¶60 O'Neil maintains that the Commission sought a finding of criminal contempt against him and that he was under a threat of jail time as a result of the injunction. Consequently, he contends that he was entitled to a jury trial and that the District Court deprived him of his right to due process by not granting him one.

¶61 O'Neil further contends that the District Court's Order should be vacated because it violates the mandates of *Huffine v. Montana Sixth Jud. Dist. Court*, 285 Mont. 104, 110, 945 P.2d 927, 931 (1997), in that "[p]rosecution for criminal contempt must be carried out pursuant to the procedures set forth in Title 46, MCA, to ensure that criminal penalties are not imposed on someone who has not been afforded the proper protections."

¶62 O'Neil's contentions are without merit and his reliance on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), and *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995),

regarding an individual's right to a jury trial in a criminal proceeding, is misplaced. The Commission's requested relief was for an injunction and a finding of *civil* contempt against O'Neil for engaging in the unauthorized practice of law, not criminal contempt.

¶63 The United States Supreme Court has determined that contempt proceedings are *sui generis.*

> While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not "criminal prosecutions" within the Sixth Amendment or common understanding.

Myers v. United States, 264 U.S. 95, 104-05, 44 S.Ct. 272, 273 (1924). Moreover, contempt proceedings are within the inherent power of all courts to enforce obedience, and this ability is something the courts must possess to properly perform their functions. *Myers*, 264 U.S. at 103, 44 S.Ct. at 273.

¶64 In Montana, M.C.U.P.L. Rule 8(b) authorizes the Commission's request for a finding of civil contempt:

> (1) A civil contempt proceeding for unauthorized practice of law, as provided by § 37-61-210, MCA, or other applicable statute or law, shall be prosecuted in the manner provided by § 3-1-501, et seq., MCA.
> (2) The procedure and punishment for a civil contempt shall be provided by § 3-1-501, et seq., MCA.
> (3) Nothing set forth herein shall be construed to prohibit or limit the right of the district court to issue a permanent injunction in liew [sic] of or in addition to any punishment imposed for a civil contempt.

¶65 A person before a court charged with contempt is entitled

to due process. The nature of the due process to be afforded is codified at § 3-1-518, MCA, which provides:

> **Hearing on contempt not committed in immediate view and presence of court or judge at chambers.** (1) When a person arrested for a contempt not committed in the immediate view and presence of the court or judge at chambers has been brought up or appeared, the court or judge shall proceed to investigate the charge, shall schedule and hold a hearing on any answer that the person arrested may make to the charge, and may examine witnesses for or against the person, for which an adjournment may be had from time to time, if necessary. The judge investigating the charge and scheduling and presiding over the hearing may not be the judge against whom the contempt was allegedly committed, except that if the contempt arose from the violation of an order of the court issued after a hearing on the merits of the subject of the order, the judge who issued the order may punish the contempt or compel compliance with the order unless it is shown that the judge would not be impartial in addressing the contempt.
>
> (2) *The charged person must be given a reasonable opportunity to obtain counsel and prepare a defense or explanation prior to the hearing. The charged person may testify and call witnesses at the hearing.* [Emphasis added.]

¶66 In *Kaufman v. 21st Judicial Dist. Court*, 1998 MT 239, ¶ 33, 291 Mont. 122, ¶ 33, 966 P.2d 715, ¶ 33, we delineated the measure of due process to be afforded in contempt cases:

> In cases in which it is not necessary for a court to take instant action, however, a contemnor is entitled to

> full due process. This includes a hearing before a neutral judge, during which the contemnor is advised of the charges against him or her, has a reasonable opportunity to meet them by way of defense or explanation, has the right to be represented by counsel, has a chance to testify and call other witnesses on his behalf, and, in instances in which criminal punishment is a consequence, a finding of guilt beyond a reasonable doubt.

¶67 Furthermore, even if this were a criminal contempt proceeding, there is no general federal constitutional right to a trial by jury with respect to criminal contempt proceedings in federal or state courts. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 336-37, 24 S.Ct. 665, 670 (1904); *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178 (1975); *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552 (1994). In criminal contempt cases imposing *serious* contempt penalties, there *might be* a right to a jury trial, *see Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), however, the term "serious" has not been fully defined. In *Muniz*, a fine of $10,000 imposed on a union was insufficient to be considered serious enough to trigger the right to trial by jury. *Muniz*, 422 U.S. at 477, 95 S.Ct. at 2190-91. The Supreme Court also suggested in *International Union* that imprisonment for a period of six months or less was not a serious penalty. *International Union*, 512 U.S. at 826-27, 114 S.Ct. at 2557.

¶68 Section 37-61-210, MCA, provides that if a person practices law in any court (except a justice's court or a city court), without being licensed as an attorney, then that person is guilty of contempt of court. The law does not require any particular penalty be imposed. In addition, § 3-1-511, MCA, provides that contempt committed in the presence of the court allows a penalty of a fine not to exceed $500 or imprisonment

for a term not to exceed 30 days, or both. Section 3-1-520, MCA, provides that contempt to compel performance allows a penalty of a fine not to exceed $500 and/or confinement until the contemnor has performed the act. None of these sanctions rise to the level of a "serious" penalty as provided under federal law, and O'Neil advances no argument supporting a different definition of "serious" under State law.

¶69 O'Neil is entitled to due process under § 3-1-518(2), MCA, but the potential penalty in this action did not rise to a level that might require a jury trial. O'Neil was not charged with criminal contempt under § 45-7-309, MCA, and the Commission did not ask for confinement or a fine. Consequently, O'Neil was afforded all the process due him including a reasonable opportunity to obtain counsel and to prepare a defense or explanation prior to the hearing, as well as the opportunity to testify in his own behalf and to call witnesses at the hearing. On the facts of this case, O'Neil is not entitled to a higher standard of due process which might include a jury trial.

¶70 Accordingly, we hold that the District Court properly ruled that the contempt proceeding against O'Neil could be tried without a jury.

Issue 4.

¶71 *Whether §§ 37-61-201 and -210, MCA, are constitutional as applied by the District Court.*

¶72 O'Neil contends that the Montana Constitution does not give the Supreme Court any rule-making authority over those outside of a court setting. On the contrary, in *State v. Merchants' Credit Service*, 104 Mont. 76, 94, 66 P.2d 337, 339 (1937), *overruled on other grounds by Rae v. Cameron*, 112 Mont. 159, 114 P.2d 1060 (1941), this Court stated:

> The first question for determination is whether

> this court has jurisdiction to punish for contempt, if the acts complained of constitute unlawful practice of law. This court is by statute given the exclusive power to confer upon any persons the right to practice law and to deprive them of that right. If any person shall engage in the practice of law without being authorized so to do, *even though that practice is not done directly in this court*, it has the right to punish for contempt. [Internal citations omitted and emphasis added.]

Furthermore, "[p]ursuant to the provisions of Article VII, Section 2, of the Constitution of the State of Montana, the Montana Supreme Court has inherent jurisdiction to prohibit the unauthorized practice of law." M.C.U.P.L. Rule 1(b).

¶73 As the Bar and the Commission point out in their brief on appeal, the primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons not subject to professional regulation. In a case decided more than 90 years ago, this Court stated:

> When we consider the relationship of attorney and client and its consequences to the client, as well as to his possible adversary, it becomes manifest that insistence upon due authorization of the persons acting as attorneys is of vital importance. . . . The people have a right to presume that the law in this respect is being enforced; if it is not enforced, such persons as intrust their business to an unchallenged pretender are permitted, in matters of life, of liberty and of property, to lean upon a broken reed.

In re Bailey, 50 Mont. 365, 369, 146 P. 1101, 1103 (1915). We also recognized in *Bailey* that "it is universally held that the

practice of law is not an inherent right but a privilege, *subject entirely to state control*." *Bailey*, 50 Mont. at 369, 146 P. at 1103 (emphasis added).

¶74 O'Neil also contends that §§ 37-61-201 and -210, MCA, are too overbroad and vague to impose any restrictions on his liberty and are insufficient to support the court's finding of "criminal" contempt and entry of an injunction against him. The Bar and the Commission point out that while O'Neil did not brief the constitutionality of these statutes at the District Court level and the District Court did not address that issue, the constitutionality of these statutes was implicitly raised throughout the trial and in O'Neil's brief on appeal and thus merit this Court's review. We agree.

¶75 In spite of O'Neil's contentions to the contrary, the Legislature (and not the Supreme Court) enacted the statutes on unauthorized practice that O'Neil claims to be unconstitutional. These statues provide:

> **Who considered to be practicing law.** Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession for the purposes of parts 1 through 3 of this chapter shall be deemed practicing law.

Section 37-61-201, MCA.

> **Penalty for practicing without license.** If any person practices law in any court, except a justice's court or a city court, without having received a license

> as attorney and counselor, he is guilty of a contempt of court.

Section 37-61-210, MCA.

¶76 O'Neil incorrectly frames his freedom of speech challenge to these statutes as an overbreadth challenge. However, the overbreadth doctrine enables plaintiffs to challenge a statute, not because their own rights of free expression are violated, "but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916 (1973).

¶77 The overbreadth doctrine

> is an exception to the general rule that statutes are evaluated in light of the situation and facts before the court. A statute which can be applied to constitutionally protected speech and expression may be found to be invalid in its entirety, even if it could validly apply to the situation before the court. However, a statute cannot be challenged just because it might result in an unconstitutional abridgment of speech in a hypothetical case. Rather, the unconstitutional overbreadth must be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

State v. Allum, 2005 MT 150, ¶ 29, 327 Mont. 363, ¶ 29, 114 P.3d 233, ¶ 29 (internal citations and quotation marks omitted).

¶78 Here, O'Neil claims that there is a direct constitutional injury to his personal "First Amendment rights of freedom of speech, expression, association, petition and privacy" as a result

of a specific application of the unauthorized practice statutes to his conduct. O'Neil fails to show, however, that the impact of the statutes on the conduct of other speakers will differ from its impact on his conduct, hence his case is not susceptible to a facial overbreadth challenge based on hypothetical applications of the law not before this Court. *See Hill v. Colorado*, 530 U.S. 703, 731-32, 120 S.Ct. 2480, 2497-98 (2000). "To the extent that the statute may reach constitutionally protected expression," any potential constitutional infirmities not implicated by O'Neil's case could "be cured through case-by-case analysis of the fact situations where the statute is assertedly being applied unconstitutionally." *State v. Lilburn*, 265 Mont. 258, 270, 875 P.2d 1036, 1044 (1994), *cert. denied*, 513 U.S. 1078, 115 S.Ct. 726 (1995).

¶79 The central question O'Neil's freedom of speech challenge poses is whether the District Court's injunction that O'Neil may not engage in the practice of law, as defined by § 37-61-201, MCA, and further specified by the injunction's terms, unconstitutionally restricts O'Neil from engaging in conduct protected by the First Amendment and Article II, Section 7, of the Montana Constitution. The United States Supreme Court has responded to this question by holding that regulation of the bar "is a subject only marginally affected with First Amendment concerns." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 459, 98 S.Ct. 1912, 1920 (1978). Other courts have repeatedly rejected claims "that an individual has a First Amendment right to practice law in any way of his choosing, free even of rationally-based regulation," because such a "broadly formulated First Amendment argument here would, if successful, greatly undermine the power of states to regulate bar membership, when this power has been repeatedly recognized and upheld by the courts." *Russell v. Hug*, 275 F.3d 812, 823 (9th Cir. 2002).

¶80 Just as O'Neil has no First Amendment right to practice law

without a license, his customers have no First Amendment right to unlicensed legal representation. The Supreme Court has recognized a First Amendment right to receive legal advice, but that right is limited to clients of duly qualified attorneys consistent with "the State's interest in high standards of legal ethics." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 225, 88 S.Ct. 353, 357 (1967). The unauthorized practice statutes are narrowly tailored to target only the provision of legal services in Montana by individuals who have not proven through examination and admission to the bar that they "are qualified and possess a familiarity with [Montana] law." *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611-12 (9th Cir. 2005). There remain ample alternative channels for providing legal services to O'Neil's customers—the thousands of licensed attorneys in Montana.

¶81 O'Neil also contends that the unauthorized practice statutes are unconstitutionally vague because they fail to define what constitutes the practice of law. "A statute is void for vagueness on its face if it fails to give a person of ordinary intelligence fair notice that the statute does not permit his contemplated conduct." *Yurczyk v. Yellowstone County*, 2004 MT 3, ¶ 33, 319 Mont. 169, ¶ 33, 83 P.3d 266, ¶ 34[3] (citing *State v. Martel*, 273 Mont. 143, 150, 902 P.2d 14, 18 (1995)).

¶82 This Court has long defined the practice of law to include legal services whose product touches legal matters not immediately at issue in court:

> A person who makes it his business to act and who does act for and by the warrant of others in legal

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The paragraph numbers in the Pacific Reporter differ from the paragraph numbers in the Montana Reports because Pacific Reporter numbered two consecutive paragraphs the same.

> formalities, negotiations or proceedings, practices law; and when his acts consist in advising clients touching legal matters pending or to be brought before a court of record, or in preparing pleadings or proceedings for use in a court of record, or in appearing before a court of record, either directly or by a partner or proxy, he is practicing law in a court of record.

Bailey, 50 Mont. at 367-68, 146 P. at 1002 (internal citations omitted). Here, §§ 37-61-201 and -210, MCA, provide fair notice of the prohibited conduct.

¶83 Accordingly, we hold that §§ 37-61-201 and -210, MCA, are constitutional as applied by the District Court.

Issue 5.

¶84 *Whether the District Court erred in finding that O'Neil engaged in the unauthorized practice of law.*

¶85 O'Neil argues that the injunction is "neither precise nor comprehensible to a reasonable person" and that the phrase "things usually done or performed by an attorney at law in the practice of his profession" is "vague rather than precise, subjective rather than objective, and utterly insufficient to support an injunction, much less the threat of criminal contempt for the violation of that injunction."

¶86 In its written judgment filed January 10, 2005, the District Court listed the following as indicia of the practice of law:

a. The giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.

b. Selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.

c. Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state.

d. Negotiating the legal rights or responsibilities of others.

e. Holding one's self out or advertising one's self as an attorney admitted to practice law in Montana; or, holding one's self out as a non-attorney entitled to practice law in Montana; or otherwise advertising services in a manner that would reasonably mislead the public to believe that one is an attorney, or otherwise licensed or certified legal advocate in the courts of the State of Montana.

Contrary to O'Neil's contentions, these indicia are precise, comprehensible to a reasonable person and sufficient to prevent a person of common intelligence from having to guess at their meaning.

¶87 O'Neil's conduct of drafting pleadings for his customers, providing them with legal advice and appearing in court with his customers, unquestionably constitutes "practicing law" under § 37-61-201, MCA. And, O'Neil readily admits that he has done so without having received a license to practice law under § 37-61-210, MCA.

¶88 Accordingly, we hold that the District Court did not err in finding that O'Neil engaged in the unauthorized practice of law.

¶89 O'Neil also claims that we should give full faith and credit to the acts of the Tribes as we would the acts of any other state or federal government. On that basis, he argues that because he is an attorney licensed to practice in the Blackfeet Tribal Court, we should allow him to practice law in our State courts. First, as already noted in this Opinion, O'Neil is not an attorney with the Blackfeet Tribal Court, he is a lay advocate. Second, absent a statutory requirement to the contrary, the doctrine of full faith and credit does not apply here. The Tribe is a sovereign nation and can license whomever it wants before its courts. There is no

requirement that full faith and credit be given to that decision as regards the practice of law in Montana's State courts.

¶90 O'Neil further claims that he should be admitted to practice before Montana's state courts *pro hac vice*. However, Montana's rules on *pro hac vice* admission require admission in "the highest court of another state." Rules for Admission to the Bar of Montana § 4 (2005). O'Neil is not an attorney and he is not from out of state. We do not perfunctorily admit attorneys to practice *pro hac vice* from out of state; there is an entire process they must go through, not the least of which is that they must be admitted to the practice of law in another state by that state's highest court.

¶91 Affirmed.

/S/ JAMES C. NELSON

We concur:
/S/ JIM RICE
/S/ W. WILLIAM LEAPHART
/S/ PATRICIA COTTER
/S/ BRIAN MORRIS

Hon. Deborah Kim Christopher
20th Judicial District Court
Lake County Courthouse
106 Fourth Avenue E
Polson, MT 59860
(406) 883-7360

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW, Petitioner, vs. JERRY O'NEIL, ON BEHALF OF HIMSELF, HIS CLIENTS AND HIS CONSTITUENTS, Respondent.	Cause No. DV 02-378B **JUDGMENT AND PERMANENT INJUNCTION**

The above-entitled cause came on regularly for trial on November 29, 2004 before the Honorable Deborah Kim Christopher presiding without a jury and was tried. Special Deputy County Attorney David A. Hawkins appeared on behalf of the Petitioner, the Commission on Unauthorized Practice of Law (hereinafter referred to as UPL), and Respondent Jerry O'Neil (hereinafter referred to as O'Neil) appeared pro se.

Before trial the court issued partial summary judgment on Respondent's Counterclaims. Those findings and order are incorporated by this reference.

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted. The Court, having considered the evidence and heard argument, issued a Bench Ruling finding O'Neil in contempt and finding a permanent injunction appropriate. This judgment and injunction follows in accord with that ruling.

JURISDICTION

1. The UPL complaints shall be by written petition filed by the Commission in its name with the district court in the district in which the respondent resides or maintains his or her principal place of business. MT Comm. Unauth. Prac. Law Rule 8 (2003)
2. Petitioner is the Supreme Court Commission on the Unauthorized Practice of Law (UPL). The UPL is authorized to bring this action pursuant MT Comm. Unauth. Pract Law Rule 1 (2003).
3. O'Neil is a resident of Flathead County, Montana.
4. This Court has jurisdiction of this matter.

FINDINGS OF FACT

1. O'Neil is not, and never has been, admitted in or licensed to practice law in Montana. He has not attended law school. He has not sat for the bar. He is not admitted in or licensed to practice in any sister states in the United States.
2. O'Neil is engaged in an independent business based in Flathead County, Montana.
3. O'Neil promotes his business as that of an "Independent Paralegal".
4. O'Neil works without the supervision of a licensed attorney.
5. O'Neil consults with customers and potential clients on legal issues. In consulting, O'Neil determines the salient facts and pertinent law. O'Neil analyzes the facts and the law.

O'Neil advised on legal rights and responsibilities, suggests legal remedies and chooses legal documents to file based on his analysis of his clients' wishes.

6. On at least one occasion, O'Neil proposed to review a court file, provide his analysis of the legal situation and propose what he believed to be in the person's "best interest". He proposed to then take legal action to accomplish legal goals for this person in the form of dismissing a petition for dissolution of marriage or bringing the dissolution to a legal conclusion. O'Neil offered to provide these services for an hourly rate of $90 per hour. These services were offered to an incapacitated person who had been appointed a guardian and an attorney to represent his interests. O'Neil was solicited to provide these services by the incapacitated person's wife against whom there was a restraining order preventing her from having contact with the incapacitated person.

7. O'Neil drafts pleadings and other legal documents for others. He prepares these documents with the intent that they be filed in court. It is intended that the court take action through these pleadings.

8. Specifically, O'Neil routinely prepares pleadings for the dissolution of marriage. On numerous occasions when O'Neil was approached by persons interested in obtaining a dissolution of marriage he interviewed them. As a result of his interview, he determined the appropriate legal forms he believed were necessary for their particular dissolution, and prepared those forms. He testified clients might be offered choices from various selections of language he had created to deal with various aspects of their lives. O'Neil drafted those selections and the forms he used.

9. O'Neil also prepares testamentary wills.

10. O'Neil prepares pleadings without identifying himself as the responsible party and designates his customer as *pro se*.

11. O'Neil attempts to appear on behalf of others in court by

written and verbal motions to the court. Through those motions and pleadings he asserts that he is entitled or authorized to appear.

12. O'Neil has appeared at counsel table, or in the courtroom, and advised others during court proceedings.

13. O'Neil charges a fee commensurate with the fees charges by area attorneys for similar services. O'Neil's fees are significantly in excess of that of a typing service or of local paralegals. Dean Knapton testified that as an experienced attorney in the local area that his hourly rate for services is $95 per hour. O'Neil defended that he provided a typing service. Knapton testified that when he last used a typing service in about 1998 he paid $5.00 per page. O'Neil charges $500 to $600 to prepare the pleadings for a dissolution which may or may not include mediation.

14. O'Neil advertises his services in the "Attorneys" section of the Yellow Pages of the phone book.

15. O'Neil's advertisement promotes that he is a member of the Montana State Bar's Section on Family Law, he practiced law in the tribal courts of the Confederated Salish and Kootenai Tribes, and he is an advocate and counselor in the tribal court of the Blackfeet Tribe. He testified that the only reason for these qualifications was to reassure customers that he would not take the money they paid for his typing. But he does not advertise he is a Montana State Senator as reassurance that he is honest. And he is fighting to be able to advertise in the "attorney" section. The Court finds that O'Neil has used his memberships to imply that he is qualified to provide the legal advice necessary to assure the documents he prepares are legally correct and individually appropriate for the customer. O'Neil's implications are false and lead a customer to believe that O'Neil is a licensed attorney.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

O'Neil is engaged in the practice of law.

1. MCA § 37-61-201 defines who is considered to be practicing law.

a. Any person who shall hold himself out or advertise as an attorney or counselor at law; or,

b. Who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court; or,

c. Who shall engage in the business and duties and perform such acts, matters and things as are usually done or performed by an attorney at law in the practice of his profession . . . shall be deemed practicing law. § 37-61-201.

2. Missoula Attorney Michael Alterowitz appeared and testified on behalf of Petitioner. His testimony is accepted as expert testimony and is credible. Alterowitz opined that the practice of law may be defined as providing legal advice to an unrelated third party with or without consideration. He reviewed the exhibits submitted at trial. He reviewed the exhibits offered as an exemplar of O'Neil's dissolution pleadings. Alterowitz opined that according to the statutory definition of the practice of law and his own understanding of that definition, O'Neil's activities constituted the practice of law.

3. State District Court Judge Loren Tucker appeared and testified on behalf of Petitioner. His testimony is accepted as expert testimony and is credible. Tucker opined that the practice of law may be defined as providing legal advice. He defined providing legal advice as assessing and evaluating facts; ascertaining what law may be applicable to those facts; offering advice about, or acting upon the determinations made about what law is applicable to the facts; and assisting others in achieving a desired goal in that context. He

reviewed the exhibits submitted at trial. He reviewed the exhibits offered as an exemplar of O'Neil's dissolution pleadings. Judge Tucker opined that according to the statutory definition of the practice of law and his understanding of that definition that O'Neil's activities constituted the practice of law.

4. The court finds the following to be indicia that a person is engaged in the practice of law:

a. The giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.

b. Selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.

c. Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state.

d. Negotiating the legal rights or responsibilities of others.

e. Holding one's self out or advertising one's self as an attorney admitted to practice law in Montana; or, holding one's self out as a non-attorney entitled to practice law in Montana; or otherwise advertising services in a manner that would reasonably mislead the public to believe that one is an attorney, or otherwise licensed or certified legal advocate in the courts of the State of Montana.

5. O'Neil consults with others about legal issues and provides legal advice. In consulting with others, O'Neil determines the salient facts and pertinent law. O'Neil analyzes the facts and the law. O'Neil advises on legal rights and responsibilities.

6. O'Neil holds himself out, and falsely implies by his advertising, that he is an attorney or an authorized legal

representative or advocate in the courts of the State of Montana through the following acts:

a. O'Neil advertises his services in the "Attorneys" section of the Yellow Pages of the phone book.

b. O'Neil promotes himself as a member of the State Bar's Section on Family Law without clarifying that he is a non-attorney member.

c. O'Neil advertises his practice of law in the Blackfeet tribal court, falsely implying that he is a licensed attorney in the courts of the State of Montana.

7. O'Neil attempts to appear in court on behalf of his customers or counsels his customers with legal advice during court proceedings.

8. O'Neil advises customers as to their legal rights and responsibilities.

9. O'Neil drafts pleadings and other legal documents. He prepares these documents with the intent that they be filed in court. He intends that the court take action on behalf of third persons through these pleadings. O'Neil prepares pleadings without identifying himself as the responsible party and designates his customer as *pro se*.

10. Based on the whole of O'Neil's actions it is obvious that he is engaged in the practice of law.

O'Neil is not authorized to practice law.

1. O'Neil admits that he is not authorized to practice law in the courts of the State of Montana.

2. The Rules for Admission to the State Bar of Montana require that a candidate for admission:

a. Be a graduate of a law school accredited by the American Bar Association

b. Apply for and receive a favorable decision from the Commission on Character and Fitness.

c. Successfully complete the Bar examinations.

d. Sign the roll of attorneys kept by the Clerk of the

Supreme Court, sign the attorney ethics oath, and recite an oath prescribed by the Supreme Court.

Rules for Admission to the State Bar of Montana.

3. O'Neil has not satisfied any of these prerequisites for admission.

4. The "Unauthorized Practice of Law" is defined as the practice of law without being first duly qualified, as prohibited by statute, court rule, or case law of the state. Mont. Comm. Unauth. Prac. Law Rule 2 (2003)

5. O'Neil is not duly qualified or admitted to practice and therefore his practice of law is unauthorized.

A finding of contempt is appropriate.

1. If any person practices law in any court, except a justice's court or a city court, without having received a license as attorney and counselor, he is guilty of a contempt of court. § 37-61-210.

2. A finding of contempt is also appropriate under § 3-1-501. This section provides that assuming to be an officer, attorney, or counsel of a court and acting as that individual without authority is contempt of the authority of the court. § 3-1-501; *In re Phillips*, (1922) 64 Mont. 492, 210 P.89; *Huffine v. Montana Sixth Judicial Dist. Court*, (1997) 285 Mont. 104, 945 P2d 927, 54 Mont. St. Rep. 1065.

3. O'Neil is found to be in contempt.

Issuing an Injunction is a proper remedy.

1. An injunction is an order requiring a person to refrain from a particular act. The order may be granted by the court in which the action is brought or by a judge thereof and, when made by a judge, be enforced as the order of the court. § 27-19-101.

2. A final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where:

a. Pecuniary compensation would not afford adequate relief.

b. It would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

c. The restraint is necessary to prevent a multiplicity of judicial proceedings; or

d. The obligation arises from a trust.

3. The rules on the unauthorized practice of law specifically provide for the issuance of an injunction to preclude the continued unauthorized practice. State. Mont. Comm. Unauth. Prac. Law Rule 8 (2003).

4. The long-standing nature of O'Neil's business and his resistance to this action implies he intends to continue with these activities unless otherwise precluded.

5. Pecuniary compensation will not restore the harm done to the judicial and legal systems, or the harm potentially done to others. Ascertaining the amount of compensation would be impossible. Bringing individual actions to preclude O'Neil's business activities would be extremely difficult and result in a multiplicity of judicial proceedings. An injunction would enforce the responsibility of the Supreme Court to maintain the professionalism of the practice of law.

From the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This court has proper jurisdiction over this matter and these parties.

2. Respondent, Jerry O'Neil, engages in the practice of law and is not authorized to do so.

3. Respondent is found to be in contempt for his unauthorized practice of law.

4. Respondent is hereby permanently enjoined from engaging in the practice of law until such time as he becomes duly authorized.

INJUNCTION

RESPONDENT IS HEREBY ENJOINED AND RESTRAINED from performing, directly or indirectly, and of the following acts within the State of Montana or with an effect upon the people of the state:

1. Respondent may not engage in the practice of law.
2. Engaging in the practice of law is defined by MCA § 37-61-201.
3. The court shall consider the following as indicia of the practice of law:
    a. The giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.
    b. Selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.
    c. Appearing, or attempting to appear, as a legal representative or advocate for others in a court of this state.
    d. Negotiating the legal rights or responsibilities of others.
    e. Holding one's self out or advertising one's self as an attorney admitted to practice law in Montana; or, holding one's self out as a non-attorney entitled to practice law in Montana; or, advertising services in a manner that would reasonably mislead the public to believe that one is an attorney, or otherwise licensed or certified legal advocate in the courts of the State of Montana.
4. These indicia are not all-inclusive, but are factors that the court may consider.
5. Whether or not they constitute the practice of law, the following are permitted:
    a. Acts or actions performed for and on behalf of himself as an individual;

b. Acting as a lay representative if authorized by administrative agencies or tribunals to do so;

c. Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator without practicing law;

d. Acts or actions performed by a guardian, conservator, guardian ad litem or other lay representative authorized by a court, administrative agency or tribunal;

e. Acting as a legislative lobbyist or in his capacity as a Montana State Senator;

f. Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law.

g. Nothing in this judgment shall affect the ability of the Respondent to provide information of a general nature about the law and legal procedures to members of the public.

6. Nothing in this judgment shall affect the ability of Respondent from acting under the supervision of an active and duly licensed Montana attorney in compliance with Rule 5.3 of the Rules of Professional Conduct.

RETENTION OF JURISDICTION

This court will retain jurisdiction of this matter for the purpose of any party to apply for clarification or for direction. Jurisdiction is retained for modification of the injunction. Jurisdiction is retained for enforcement of the judgment and injunction, and for punishment of any violation of its terms.

This judgment and injunction is effective immediately upon its entry.

ORDERED this 23rd day of November, 2004.

DATED this 7th day of January, 2005.

s/ Deborah Kim Christopher
Deborah Kim Christopher, District Judge

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 7th day of January, 2005, I served a true and complete copy of the foregoing "Judgment and Permanent Injunction" by depositing the same in the United States Mail, postage prepaid thereon, addressed as follows:

David A. Hawkins, Special Deputy County Attorney
Commission on Unauthorized Practice of Law
PO Box 577
Helena, MT 59624
Attorney for Petitioner and Counter Defendant Commission on Unauthorized Practice of Law

Stephen C. Berg, Attorney at Law
PO Box 3038
Kalispell, MT 59903

Betsy Brandborg, Attorney at Law
PO Box 577
Helena, MT 59624
Attorneys for Counter Defendant State Bar of Montana

Jerry O'Neil
985 Walsh Road
Columbia Falls, MT 59912
Pro Se Respondent and Counter-Plaintiff

/Rose Bridenstine
Rose Bridenstine
Judicial Assistant

Hon. Deborah Kim Christopher
20th Judicial District Court
Lake County Courthouse
106 Fourth Avenue E
Polson, MT 59860
(406) 883-7360

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW,
Petitioner,
vs.
JERRY O'NEIL, ON BEHALF OF HIMSELF,
HIS CLIENTS AND HIS CONSTITUENTS,
Respondent and Counter Plaintiff,
vs.
MONTANA SUPREME COURT COMMISSION ON UNAUTHORIZED PRACTICE OF LAW and THE MONTANA STATE BAR ASSOCIATION, a trade association integrated with the Montana Supreme Court,
Counter Defendants.

Cause No.
DV 02-378B

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT REGARDING UPL'S MOTION FOR SUMMARY JUDGMENT

The above cause came before the Court upon Plaintiff's Motion for Summary Judgment filed on September 14, 2004. Present at the hearing on October 28, 2004 were: David Hawkins, counsel for Plaintiff; Stephen Berg, counsel for Montana State Bar Association; and Jerry O'Neil, Defendant pro se. Counsel for the parties presented oral argument. The Court has considered the arguments of the parties, the briefs, the affidavits, and the pleadings on file in this matter and now enters the following:

FINDINGS OF FACT

1. O'Neil is not, and never has been, licensed to practice law in the State of Montana. He has not attended law school. He has not sat for or met the Montana Supreme Court's bar examination requirements. He is not licensed to practice law in any state of the United States. (O'Neil deposition p. 31, 32,44, 63, 64)

2. O'Neil is engaged in an independent business based in Flathead County, Montana.
(O'Neil deposition p. 5)

3. O'Neil promotes his business as that of an "Independent Paralegal". (O'Neil deposition p. 5.)

4. O'Neil works without the supervision of a licensed attorney. (O'Neil deposition p.37.)

5. O'Neil prepares pleadings without identifying his involvement in the drafting of the documents and designates his customer as pro sea (O'Neil deposition p. 16, 61, 75, 76)

6. O'Neil prepares affidavits of indigence for customers who have paid him to prepare the pleadings. (O'Neil deposition p. 23)

7. O'Neil has attempted to appear on behalf of his customers in court asserting that he is entitled to appear on behalf of his customers. (O'Neil deposition p. 25) Sparks v. Johnson, (1992) 252 Mont. 39, 826 P.2d 928

8. O'Neil has sat at counsel table, or in the courtroom, and advised his customers during court proceedings. Sparks V. Johnson, (1992) 252 Mont. 39, 826 P.2d 928.

9. O'Neil charges a fee. (O'Neil deposition p. 8)

10. O'Neil promotes himself as a member of the State Bar's Section on Child and Family Law. (O'Neil deposition p. 33, 77)

11. O'Neil practiced law in the tribal courts of the Confederated Salish and Kootenai Tribes, and advertised this practice to the public. (O'Neil deposition p. 63)

12. O'Neil practices in the tribal court of the Blackfeet Tribe, and uses this status to advertise his practice as an attorney to the public. (O'Neil deposition p. 25, 63)

13. O'Neil is a state legislator. (O'Neil deposition p. 45)

14. On November 15,2000, State Bar Counsel Betsy Brandborg received a telephone call from Julia Thomason at US West Dex asking if O'Neil was a licensed attorney, and if not, why he was listed under the "Attorney" heading in the Yellow Pages. (Brandborg deposition, p.20.) Brandborg explained that O'Neil was not a licensed attorney with the State Bar. fd. Thomason requested a letter confirming that information, and suggested that Brandborg also request that O'Neil's name be removed from the attorney section of the Yellow Pages. Brandborg wrote such a letter and sent a copy to O'Neil. (Third Party Defendant's Exhibit A).

15. O'Neil on November 23,2000, wrote a letter in protest, alleging Tribal licensure as an attorney. (Third Party Defendant's Exhibit B.)

16. Concerned about having made a possible misrepresentation, Brandborg called the Confederated Salish and Kootenai Tribal Court and learned that while O'Neil was licensed as an attorney, they had based that licensure upon O'Neil's representation that he was an attorney member of the Blackfeet Tribe. (Brandborg deposition, p. 21; Third Party

Defendant's Exhibit C.)

17. Upon calling the Blackfeet Tribe, Brandborg learned that O'Neil was a licensed lay advocate, not an attorney advocate. Id.

18. Brandborg called the Salish Kootenai Tribe and conveyed the information from the Blackfeet that O'Neil was not licensed as an attorney. Id. Brandborg further explained that while O'Neil was a lay member of the Family Law Section of the State Bar, section membership did not mean he was a lawyer, licensed to practice law in Montana. Id.

19. Brandborg then wrote a second letter to Thomason at US West Dex, dated December 5, 2000, to clarify the State Bar's position, specifically stating: "The State Bar of Montana cannot advise you as to the appropriate placement of Mr. O'Neil's advertisement. I strongly encourage you to consult your own attorney as to whether it is appropriate to include Mr. O'Neil's advertisement under the attorney heading in the yellow pages." (Third Party Defendant's Exhibit D.)

20. O'Neil incorrectly believes Brandborg wrote letters to the Tribes "saying that [he] wasn't licensed in the state of Montana and, therefore, they might want to take [his] license away in the Tribal court." (O'Neil deposition, p. 63.) There were no letters written concerning O'Neil from Brandborg to either Tribe. Brandborg did not convey either of the letters to US West Dex to the Tribes, nor did Brandborg write a separate letter to either Tribe confirming the information in the telephone calls. (Third Party Defendant's Exhibit E.)

21. There is no evidence before the Court to support O'Neil's mistaken belief that Brandborg conveyed any writing to the Tribes about his licensure.

22. O'NEIL has and continues to hold himself out or advertise himself as an attorney admitted to practice law in Montana or as a non-attorney entitled to practice law in Montana or otherwise advertises services in a manner that

would lead the public to believe that he is an attorney or a licensed or certified legal advocate. (O'Neil deposition p. 77)

23. O'Neil advertises in the 2003 Greater Flathead Valley CenturyTel phone book as an "independent paralegal." The ad includes the statement "Member, Child and Family Law Section of the Montana State Bar." (O'Neil deposition, pp. 76-77.)

24. O'Neil advertises his services in the "Attorneys" section of the Yellow Pages of the phone book. (O'Neil deposition p. 5-6, 77.)

25. Third party Respondent, the Montana State Bar Association, is a membership organization established by the Supreme Court to govern and control the practice of law in the State of Montana. In the Order creating the Bar, the Court stated the Bar's purpose to maintain and improve "the administration of justice in Montana, and to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar...and to insure that the responsibilities of the legal profession to the public are more effectively discharged." (Supreme Court Order Unifying the State Bar, No. 12616, 1974.)

26. Petitioner's Petition for Finding of Civil Contempt and for Permanent Injunction against O'Neil was filed July 15,2002. O'Neil's Answer to the Petition and Demand for Jury Trial was dated August 2,2002. Later, on November 19,2002, without requesting leave of Court or Parties, O'NEIL filed his Third Party Complaint against the Montana State Bar
Association and Petitioner.

27. O'Neil's Third Party Complaint was filed more than 30 days after Petitioner's Complaint was filed. (Court Record).

28. O'NEIL's Third Party Complaint was filed more than two years after the event triggering this action, namely, the initial Brandborg letter to US West Dex on November 15, 2000.

29. O'Neil failed to file a response to Petitioner's and Third Party Defendant's Motion for Summary Judgment, which were filed September 14,2004 and September 10,2004 respectively, until October 27,2004. There is no record of his requesting or receiving permission from the parties or this Court to late file his response on October 27, 2004 in violation of Rule 12(a) of the Montana Rules of Civil Procedure.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. Jurisdiction.

Petitioner is the Supreme Court Commission on the Unauthorized Practice of Law (UPL). The UPL is authorized to bring this action pursuant to MT Comm. Unauth. Prac. Law Rule I (2003).

O'Neil is a resident of Flathead County, Montana. UPL complaints shall be by written petition filed by the Commission in its name with the District Court in the district in which the respondent resides or maintains his or her principal place of business. MT Comm. Unauth. Prac. Law Rule 8 (2003).

This Court has jurisdiction of this matter.

2. Summary judgment is not appropriate as to UPL's complaint.

There remain genuine issues as to the material facts regarding Mr. O'Neil's practice of law as alleged in the complaint filed by the UPL Commission. Summary judgment is not appropriate when there are disputed issues of fact. Olson v. Osmolak, 2003 MT 151,316 Mont. 216, 70 P.3d

1242. A motion for summary judgment can only be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c) M.R.Civ.P.

The burden is on the party seeking summary judgment to demonstrate a complete absence of any genuine issues of material fact. Payne Realty & Hous. v. First Sec. Bank, (1992),256 Mont. 19,24, 844 P.2d 90,93. Moreover, the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of the party opposing summary judgment. Fisch v. Mont. Rail Link, Inc., 2003 MT 76, 315 Mont. 13, 67 P.3d267.

There is a genuine issue of material fact concerning the nature of Mr. O'Neill's business and whether he engaged in the practice of law.

3. Summary judgment is appropriate as to the third party complaint.

There is no genuine issue as to any material fact on the issues contained in O'Neil's "Counter-Claim". The UPL Commission is entitled to judgment as a matter of law. "A summary judgment.. . may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Rule 56© M.R.Civ.P. In order for summary judgment to issue, the movant must demonstrate that there is no genuine issue as to all facts deemed material in light of the substantive principles entitling the movant to judgment as a matter of law. Rule 56© M.R.Civ.P., *Board of Dentistry v. Kandarian*, (1994) 268 Mont. 408,886 P.2d 954; Frigon v. Morrison-Maierle, Inc., 233 Mont. 113, 117,760 P.2d 57,60 (1988); *Cereck v. Albertson's*, (1981) 195 Mont. 409, 411, 637 P.2d 509,51 L

4. Respondent's counter-claim for defamation is dismissed.

Defamatory words, to be actionable, as exposing a person to hatred, contempt, ridicule, or obloquy or which have a tendency to injure him in his occupation, must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the plaintiff or cause him to be shunned and avoided. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks him and subjects him to jests or banter so as to affect his feelings.

An expression of opinion is generally not actionable. Frigon v. Morrison-Maier/e, Inc., (1988) 233 Mont. 113, 760 P.2d 57, followed in Board of Dentistry. v. Kandarian, (1994) 268 Mont. 408,886 P.2d 954.

O'Neil is a state legislator and is therefore a public figure. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,41 L.Ed.2d 789, 94 S.Ct. 2997 (1974), as applied by *Wheeler v. Green*, 286 Ore. 99,593 P.2d 777 (1979), the U.S. Supreme Court affirmed the District Court ruling that the privilege established in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 LED.2d 686, 84 S.Ct. 710 (1964), for criticism of a public figure's conduct applied to persons like the defendant who were not connected with the news media. In *Gertz*, the U.S. Supreme Court expanded the privilege of fair comment, established in *New York Times Co.*, to apply to all public figures and did not limit the application of the privilege only to media defendants. *Williams v. Pasma*, (1982) 202 Mont. 66, 656 P.2d 212.

In order to recover actual damages, a private person suing for defamation must prove that: (1) the published material was false; (2) the defendant is chargeable with fault; and (3) actual injury ensued. Further, such plaintiff may recover punitive damages if he proves malice. When the

plaintiff is a public official or a public figure, he may recover only if he proves malice. *Madison v. Yunker*, (1978) 180 Mont 54, 67, 589 P.2d 126.

There is no evidence to support a finding of defamation. There is no evidence that the UPL participated in any of the defamatory actions alleged. Because O'Neil is a public figure, evidence of actual malice is required. There is no evidence that the UPL acted with malice.

The counter-claim for defamation is dismissed.

5. The counter-claim for tortious interference with contract is dismissed.

To establish tortious interference of contract, there must be a contract.

Under § 28-2-102 MCA it is essential to the existence of a contract that there be:

a. Identifiable parties capable of contracting;
b. Their consent;
c. A lawful object; and,
d. A sufficient cause or consideration.

O'Neil has not presented any evidence of the existence of a contract.

There are four elements required to establish the tort of interference with a contract. It must be shown that the acts (l) were intentional; (2) were calculated to cause damage to the plaintiff in his or her business; (3) were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) actually resulted in damage and loss to the plaintiff Northwestern *Nat'l Bank v. Weaver-Maxwell, Inc.*, (1986) 224 Mont. 33, 40-41, 729 P.2d 1258, 1262; *Bolz v. Myers*, (1982) 200 Mont. 286, 295, 651 P.2d 606, 611.

O'Neil's claim for defamation fails as there is no evidence in the record that the published materials, i.e., the letters to US West Dex, were false. The undisputed facts establish that

O'Neil is not an attorney licensed by the State Bar of Montana or any Tribe in Montana. O 'Neil testified in his deposition that he was not licensed to practice law in the state of Montana. (O'Neil deposition, 63-64.) Even assuming, as O'Neil does, that Brandborg wrote the Tribes saying that O'Neil was not a lawyer, O'Neil's claim fails. The core fact at issue is that O'Neil is not a lawyer. The published material, to the extent it exists, is true, not false. UPL is also entitled to summary judgment on this claim.

Summary judgment is appropriate on the claim of tortuous interference with contract as no facts support the claim and there are no genuine issues of material fact. In order to assert a prima facie claim of tortious interference with business relations, O'Neil must show that the UPL "intentionally committed a wrongful act without justification or excuse." *Richland Nat 'l Bank & Trust v. Swenson*, (1991) 249 Mont. 410,419,816 P.2d 1045, 1051. O'Neil must show that the UPL acts were: (1) intentional and willful; (2) calculated to cause damage to O'Neil in his business; and (3) done with the unlawful purpose of causing damage or loss without justifiable cause on UPL's part. *Healow v. Anesthesia Partner*, 92 F.3d 1192 (9th Cir. Mont. 1996), *Pospisil v. First Nat'l Bank*, 2001 MT 286,307 Mont. 392, 37 P.3d 704.

O'Neil did not present evidence to satisfy any of the four elements to establish the tort of interference with a contract.

6. The Counter-claim of violation of privacy is dismissed.

Summary judgment is appropriate on the claims involving privacy as no facts support the claim and there are no genuine issues of material fact. O'Neil alleges that the UPL's conduct "violates his customer's rights to individual privacy by interfering with their discussion and disclosure of matters involving the preparation and strategy of their personal and legal matters with whom they choose." (Counter-claim, p. 8,

lines 13-15.) O'Neil also alleges the UPL is violating his own, his customer's and his constituents right to privacy guaranteed by Article II, Section 10 of the Montana Constitution. (Counter-claim, p. 8, lines 10-12.) O'Neil has no private right of action for invasion of privacy against UPL, a Supreme Court created entity. Nor does O'Neil have standing to claim he's protecting the privacy rights of his clients and constituents.

Article II, Section 10 of the Montana Constitution provides: "Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." In *State v. Long*, (1985) 216 Mont. 65, 71, 700 P.2d 153, 157, the Montana Supreme Court very clearly held that the privacy section of the Montana Constitution, Mont. Const. Art. n, § 10, contemplated privacy invasion by state action only. There is no private right of action against a non-governmental entity permitted under Montana's Constitution. O'Neil's claim is a private action against a non-governmental entity, and as such, is specifically barred by *Long*.

There are no material issues of fact. O'Neil advertises in the 2003 Greater Flathead Valley CenturyTel phone book as an "independent paralegal." The ad includes the statement "Member, Child and Family Law Section of the Montana State Bar." (O'Neil deposition, p. 7677.) Under the facts presented against the UPL, the suggestion of intrusion into O'Neil's private activities seems bizarre. O'Neil's ad implies he is a member of the State Bar. Certainly, clarification of the lay status of the Section membership in conversations with the Tribe and correspondence with US West Dex does not fall into the category of intruding into O'Neil's "private activities."

7. The UPL is immune from tort actions.

Under State. Mont. Comm. Unauth. Prac. Law Rule 10 (2003) the UPL is immune from suit. Rule 10 provides: (a) Complaints, testimony and other presentation or arguments submitted to the Commission on Unauthorized Practice of Law, an area committee, any member of the Commission or of any such committee, and any Commission investigator or special counsel, all proceedings and conduct maintained or engaged in, and all testimony and showings with respect to any of said matters shall be absolutely privileged, and no civil litigation predicated thereon may be instituted or maintained.

Members of the Commission on Unauthorized Practice, members of the area committees, investigators, special counsel, and members of their respective staffs shall be immune from civil suit and damages for any conduct or occurrence in the course of or arising out of performance of any official duties in connection with these Rules. MT Comm. Unauth. Prac. Law Rule 10 (2003).

Immunity is also provided under MCA § 2-9-112.

(1) The state and other governmental units are immune from suit for acts or omissions of the judiciary.

(2) A member, officer, or agent of the judiciary is immune from suit for damages arising from his lawful discharge of an official duty associated with judicial actions of the court.

(3) The judiciary includes those courts established in accordance with Article VII of The Constitution of the State of Montana.

O'Neil's counter-claims are dismissed because the UPL is immune from suit and O'Neil has not presented any compelling reason to overcome this immunity.

8. O'Neil lacks standing to bring suit on behalf of others.

O'Neil's claim of protection for his clients and constituents fails as he has no standing to assert violation of another person's rights. *Monk v. Teeter*, 951 F.2d 361 (9th Cir. Cat. 1992).

9. Additionally, O'Neil committed technical violations that support the dismissal.

The Third Party Complaint was untimely filed by O'Neil against the Supreme Court's Commission on the Unauthorized Practice of Law. Rule 14 of the Montana Rules of Civil Procedure require leave of the Court and Parties for the filing of the Third Party Complaint. Leave to file was not sought or given. Petitioner included the defense in its Affirmative Defenses and O'Neil had notice of his procedural error. The counter-claims are subject to dismissal on that basis alone. M.R.Civ.P. Rule 14.

O'Neil's claim for relief for defamation also fails as a matter of law under § 27-2-204(3), MCA as O'Neil's Third party Complaint was filed more than two years after the event triggering the action in O'Neil's complaint, namely, the initial Brandborg letter to US West Dex on November 15,2000.

From the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

JUDGMENT

O'Neil's counter-claims of defamation, tortious interference with contract and violations of privacy are dismissed with prejudice.

DATED this 23rd day of November, 2004.

/Deborah Kim Christopher

Deborah Kim Christopher, District Judge

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 23rd day of November, 2004, I served a true and complete copy of the foregoing "Findings of Fact, Conclusions of Law and Judgment Regarding UPL's Motion for Summary Judgment" by depositing the same in the United States Mail, postage prepaid thereon, addressed as follows:

David A. Hawkins, Special Deputy County Attorney
Commission on Unauthorized Practice of Law
PO Box 577
Helena, MT 59624
Attorney for Petition and Counter Defendant Commission on Unauthorized Practice of Law

Stephen C. Berg, Attorney at Law
PO Box 3038
Kalispell, MT 59903

Betsy Brandborg, Attorney at Law
PO Box 577
Helena, MT 59624
Attorneys for Counter Defendant State Bar of Montana

Jerry O'Neil
985 Walsh Road
Columbia Falls, MT 59912
Pro Se Respondent and Counter-Plaintiff

s/ Rose Bridenstine
Rose Bridenstine, Judicial Assistant

Jerry O'Neil
985 Walsh Road
Columbia Falls, Montana 59912
406-892-7602
406-892-7603 FAX
oneii@centurytel.net

IN THE SUPREME COURT OF STATE OF MONTANA

MONTANA SUPREME COURT COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW, Petitioner and Respondent, vs. JERRY O'NEIL, On Behalf of Himself, His Clients & His Constituents, Respondent and Appellant, vs. THE MONTANA STATE BAR ASSOCIATION, a Trade Association Integrated with the Montana Supreme Court. Defendant and Respondent.	No. 04-857 **PETITION FOR REHEARING**

I realize the Montana Supreme Court cannot afford to let a jury decide that my helping people is proper. Being the head of the monopoly known as the "integrated bar," they have too much to lose if a jury rules in my favor. Therefore they have to allow the lower court to summarily rule against me without allowing me a jury trial.

But I would appreciate it if they didn't overlook the fact

that I am an "advocate", or include the lie, in their opinion which states that I am a "lay advocate" in the Blackfeet Tribe. When Chief Justice Gray states, "the devil is in the details," does she mean the court is justified to lie about those details in order to reach its desired end? This shallow obfuscation is demeaning to the intelligence of the members of Montana's highest court and to the Montana public.

There are 3 levels of advocates in the Blackfeet Tribal Court; "attorney advocates" who are licensed by the Montana Supreme Court, "lay advocates" who are members of the Blackfeet Tribe, and "advocates" (advocate and counselor) who have successfully completed an application and questionnaire on Tribal law prepared by the Chief Judge and paid the required admission fee.

To support the lie that I am a "lay advocate" ignores my Certificate of Admission which was attached to *Appellants' Opening Brief,* ignores that I am not a member of the Blackfeet Tribe, and ignores the transcript (pg 359, lines 1-4) where Judge Christopher acknowledges:

> You've indicated and provided proof to the court that the Tribal – the Blackfeet Tribal Court does authorize you to appear before them as an advocate and a counselor.

The court should also be ashamed of itself for predicating Montana citizens' right to privacy in communications on the requirement they be licensed by the state before they make those communications.

Being the highest court in the State of Montana, surely the Montana Supreme Court can draft opinions which accomplish its purposes without having to include lies in them.

Dated this 14th day of November 2006.

s/ Jerry O'Neil

CERTIFICATE OF SERVICE

I hereby certify that today I served true and accurate copies of the accompanying *Petition for Rehearing* by depositing said copies into the U.S. Postal Service, postage prepaid, addressed to the parties listed below:

David A. Hawkins, Attorney at Law Commission on Unauthorized Practice PO Box 577 Helena, Montana 59624	John P. Connor, Jr., Asst Atty General PO Box 201401 Helena, Montana 59620-1401
Stephen C. Berg, Attorney at Law PO Box 3038 Kalispell, Montana 59903	Clerk of the Supreme Court 215 North Sanders PO Box 203003 Helena, Montana 59620-3003
Donald R. Murray, Attorney at Law 431 1st Avenue West Kalispell, Montana 59901	

Dated this 14th Day of November 2006.

s/ Jerry O'Neil

IN THE SUPREME COURT OF
THE STATE OF MONTANA
No. 04-857

MONTANA SUPREME COURT COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW,
Petitioner and Respondent,

v.

JERRY O'NEIL, on Behalf of Himself, His Clients and His Constituents,
Respondent and Appellant

v.

THE MONTANA STATE BAR ASSOCIATION, A Trade Association Integrated with the Montana Supreme Court,
Defendant and Respondent.

ORDER

FILED
DEC 06, 2006

Ed Smith
CLERK OF THE
SUPREME COURT
STATE OF
MONTANA

Before this Court is Jerry O'Neil's *pro se* Request for Rehearing filed November 15, 2006. The Court having considered the matter,

IT IS HEREBY ORDERED that Jerry O'Neil's Request for Rehearing is DENIED.

IT IS FURTHER ORDERED that the Clerk of this

Court give notice of this C[illegible] by mail to Jerry O'Neil at his last known address and to all counsel of record.

DATED this 6th day of ~~November~~ December, 2006.

s/ James C. Nelson

s/ W. William Leaphart

s/ Patricia Cotter

s/ Brian Morris

s/ Jim Rice

David A. Hawkins
Special Deputy County Attorney
Commission on Unauthorized Practice of Law
PO Box 577
Helena, Montana 59624
Attorney for Petitioner

IN THE ELEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FLATHEAD

COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW, Petitioner, and JERRY O'NEIL, Respondent.	Case No. DV-02-378(B) PETITION FOR FINDING OF CIVIL CONTEMPT AND FOR PERMANENT INJUNCTION KATHERINE R. CURTIS

COMES NOW the Commission on the Unauthorized Practice of Law as Petitioner, through its special counsel, David A. Hawkins, and petitions the Court as follows:

PETITIONER'S COUNSEL

David A. Hawkins appears herein as counsel for the Commission on the Unauthorized Practice of Law. This appearance is made at the request of the Commission and by special appointment of the Flathead County Attorney designating counsel as a Special Deputy County attorney for the purpose of prosecuting this action. The Court is also advised that counsel is regularly employed by the State of Montana. Counsel is appearing in a personal capacity on behalf of the Commission and is not representing his regular

employer in any capacity whatsoever.

PARTIES

The Commission on the Unauthorized Practice of Law is a Commission created by the Montana Supreme Court under Article VII, Section 2 of the Constitution of the State of Montana. The Commission is governed by the Rules of the Commission on Unauthorized Practice.

Jerry O'Neil is a resident of Flathead County. O'Neil is alleged to be engaging in acts which constitute the practice of law in Flathead and other Montana Counties.

JURISDICTION

This Court has jurisdiction of this matter pursuant to RCUPL Rule 8(a)(1).

RELIEF SOUGHT

The Commission asks the Court to find Jerry O'Neil in Civil Contempt for the unauthorized practice of law and to issue a permanent injunction prohibiting O'Neil from engaging in such conduct.

ALLEGATIONS

a. The Commission on Unauthorized Practice is a commission duly authorized and empowered to act in these matters by the Montana Supreme Court.

b. Jerry O'Neil is a resident of Flathead County.

c. Jerry O'Neil has been and is engaged in the unauthorized practice of law.

d. O'Neil is not licensed by the State of Montana to practice law. The State Bar of Montana does not recognize O'Neil as an attorney in Montana.

e. The practice of law is defined by MCA §37-61-201 and at common law. Violation of this section is a contempt of court pursuant to MCA §37-61-210.

f. O'Neil practices law by consulting with customers on legal issues and providing legal advice. He advises customers as to their legal rights. He drafts pleadings and other legal documents. O'Neil prepares pleadings without

identifying himself as the responsible party and designates his customer as *pro se*. He prepares affidavits of indigency for customers who have paid him to prepare the pleadings. O'Neil attempts to appear on behalf of his customers in court and asserts that he is entitled to appear on behalf of his customers. He advises his customers during court proceedings. O'Neil charges a fee commensurate with the fees charged by area attorneys for similar services. His fees are in excess of that of a typing service or of local paralegals. O'Neil advertised his services in the "Attorneys" section of the Yellow Pages® of the phone book for Flathead County until the directory publisher refused to continue his advertisement. He promotes his business as that of an "Independent Paralegal". As such, O'Neil works without the supervision of a licensed attorney. Neither the law nor the rules governing the practice of law in the State of Montana allow for the practice of law by independent paralegals. O'Neil promotes himself as a member of State Bar Section on Family Law, implying that he is a licensed attorney. Until recently, O'Neil practiced law in the tribal courts of the Confederated Salish and Kootenai Tribes. He likewise advertised this practice to the public, again implying that he was a licensed attorney in the State of Montana. O'Neil has engaged and engages in other acts and practices constituting the practice of law.

g. The Commission repeatedly advised O'Neil that he was violating the rules against the Unauthorized practice of law. He disregarded these cautions.

h. The Commission ordered O'Neil to cease and desist his practice of law. O'Neil refused and he continues to engage in the unauthorized practice of law.

i. Because O'Neil refused to comply with the cease and desist order of the commission, the commission is forced to bring this petition.

PRAYER FOR RELIEF

Petitioner requests that the Court grant the following relief:

a. That O'Neil be found in civil contempt for engaging in the unauthorized practice of law;

b. That the Court punish O'Neil for the civil contempt as provided for in MCA §3-1-501 et seq.;

c. That the Court issue a permanent injunction proscribing O'Neil from engaging in the unauthorized practice of law;

d. That the Court allow the Commission its costs and an attorney stipend for the expense of bringing this action. Petitioner asks that such costs and stipend be determined by a separate hearing; and

e. For such other and further relief as the Court may deem just and equitable.

Dated this 12th day of July, 2002

By: s/ David A. Hawkins
David A. Hawkins

STATE OF MONTANA ELEVENTH JUDICIAL DISTRICT,
FLATHEAD COUNTY
FLATHEAD COUNTY JUSTICE CENTER
920 SOUTH MAIN, KALISPELL, MONTANA 59901

District Court Judges

Ted O. Lympus	Katherine R. Curtis	Stewart E. Stadler
(406) 758-5667	(406)758-5669	(406) 758-5906

Bonnie J. Olson
Court Administrator

February 13, 2001

Mr. James G. Hunt, Chair
Commission on Unauthorized Practice
of the Supreme Court of the
State of Montana
P. O. Box 577
Helena MT 59624

Dear Mr. Hunt:

We are writing to you as chair of the Commission on Unauthorized Practice. Last fall you indicated that the Commission has been funded and would investigate complaints concerning the unauthorized practice of law.

There are two individuals in Flathead County who advertise themselves as "independent paralegals" and who routinely prepare and file pleadings for people initiating or responding to dissolution or child custody proceedings. For a period of time, we directed the Clerk of Court to not accept pleadings prepared by one of these persons (Connie Monroe), because her papers were very deficient in many respects. She

apparently has now gotten some training and is asking us to once again accept her papers. We are very reluctant to do so because it would then appear that we were sanctioning the unauthorized practice of law, but we cannot then justify allowing the other individual (Jerry O'Neil) to continue with essentially the same practice.

We have been told by these two individuals, and their clients, that they are not giving legal advice, but we believe the contrary to be true. For example, one of Mr. O'Neil's customers stated in Court that he had been told that the 20-day waiting period for a decree of dissolution could be waived and directed the Court's attention to a document prepared by Mr. O'Neil that purportedly accomplished this waiver. It appears to us that this is the rendering of legal advice, and bad advice at that. We know that Judge Whelan in Butte recently had an experience with pleadings prepared by Mr. O'Neil (who is also a state senator), and felt as well that he was engaging in the unauthorized practice of law.

We have been somewhat reluctant in the past to raise this matter because of our concern that the legal system is becoming progressively unaffordable for many people, and these paralegals are more affordable. However, our local bar, with the assistance of the local Legal Services office, has just begun a *pro bono* project to assist many of these people in getting good, affordable legal advice, so it seems timely to request the Commission to investigate to determine if, in fact, there are litigants who are receiving and acting upon legal advice from these non-lawyers.

Thank you, and please feel free to contact any of us or our Court Administrator, Bonnie Olson, for further information.

Sincerely yours,

s/ Ted O. Lympus	s/ Katherine R. Curtis	s/ Stewart E. Stadler
(406) 758-5667	(406)758-5669	(406) 758-5906

Karen Sparks
566 Spokane Ave.
Whitefish, MT 59937-2781
862-4922

Jerry O'Neil
P.O. Box 575
Kalispell, MT 59903
752-8903

IN THE SUPREME COURT OF
THE STATE OF MONTANA

JERRY O'NEIL, and KAREN SPARKS, Petitioners, vs. BRAD JOHNSON, Personally and as City Judge of WHITEFISH CITY COURT, Respondents.	CASE NO. PETITIONERS' RESPONSE TO RESPONDENTS' BRIEFS AND TO THEIR MOTION TO DENY PETITION

Come now Petitioners Karen Sparks and Jerry O'Neil, who both reply to Respondents briefs and motion to deny the petition as follows:

I. STANDING OF PETITIONER KAREN SPARKS

As the injured party and as a party whose Constitutionally protected right to receive due process in the courts has been

violated, Karen Sparks has standing to be a petitioner in this case.

II. STANDING OF PETITIONER JERRY O'NEIL

The standing of Petitioner O'Neil in this case rests upon the premise that Karen Sparks has the right to appear and act in a court of limited jurisdiction by attorney, with an attorney of her choice. If "any person" includes Jerry O'Neil then, besides being Karen Sparks' right to appear by him, it is also O'Neil's right to go to court to protect this relationship. What sort of advocate would he be if he did not protest when the Court denied justice to those that were depending on him?

Although O'Neil is not a licensed attorney, he takes seriously the right to have counsel of one's choosing. Some of his "clients" and/or friends include: James Blakeley; Clark Albertson; Ron Wollak; Katherine Wolfe; Gerald Heffner and D.J. Heffner. All of these people have been faced with serious hardship due to their inability to retain competent counsel when they were without funds. It is O'Neil's belief that far to many litigants are shorted on their ration of justice in the State of Montana. They are being denied any type of knowledgeable help when appearing in court.

O'Neil has actively sought to protect the public's right to receive justice from their courts. As part of his quest to secure justice for others O'Neil has been fined $500.00 for typing and mailing papers for a man who was behind bars. He has been required to pass the Blackfeet Tribal bar examination. In order to obtain meaningful access to the courts for some of the unrepresented citizens of Montana, O'Neil has been active in Americans for Legal Reform (HALT) and is currently the president of VOCAL of Montana (Victims Of Constitutionally Abusive Laws). In order to demonstrate to the public that their access to the courts is not subject to democratic controls, O'Neil ran for the position of Justice on the Montana Supreme

Court. O'Neil considers his activism to be of both a religious and a political nature.

It isn't right to forbid Petitioner Sparks the help of O'Neil because of his religious or political practices. The United States Supreme Court stated In Re Edna Smith Primus, 436 U.S. 412, that:

> 1. Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.
>
> 2. Broad prophylactic rules in the area of free expression are suspect and precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.
>
> 3. Disciplinary rules should not be utilized to obstruct the distribution of legal services to all those in need of them.
>
> 4. Where political expression or association is at issue, (the Supreme Court) has not tolerated the degree of imprecision that often characterizes government regulations of the conduct of commercial affairs. - - - (T)hat the State may proscribe in person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity on behalf (of an organization engaging in litigation involving substantial civil liberties questions as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public)."

O'Neil's seeks to obtain meaningful access to the courts for those that because of various circumstances including lack of funds are unable to adequately represent themselves or obtain licensed attorneys. These activities are fundamental rights for both O'Neil and for those that seek his help. These rights have

the protection of the First Amendment.

The Court should narrowly construe its rules regulating and restricting commercial activities in order not to obstruct the distribution of legal services by O'Neil and by others of ability to all those in need of them. Several of the cases cited by Respondents were aimed at curbing commercial activities rather than curbing the public's access to the courts. These cases regarding commercial activities include: State v. Merchants' Credit Service, 66 P.2d 337 (Mont. 1937) (held that the work "person" in section 9629, R.C.M. 1935 (a statutory precursor to section 25-31-601, MCA), does not include corporations; State ex rel. Frieson v. Isner, 285 S.E.2d 641 (W.Va. 1981) (the primary issue was whether a credit agency could appear through one of its officers or employees; Bump v. Barnett, 16 N.W.2d 579 (Iowa 1944) (ruled that a manager of a collection agency could not engage in the practice regularly of representing clients in justice courts. In none of these was the issue raised of whether a defendant, in a criminal action in justice or city court, that was unable to retain counsel, whom the Court refused to appoint counsel for, was entitled to choose the best available person to defend her.

III. NATURE OF THE CASE

Respondents Brad Johnson and the Attorney General for the State of Montana both ignore the most important issue presented in this case. This issue is:

> IS A DEFENDANT BROUGHT BEFORE A COURT OF LIMITED JURISDICTION ON A CRIMINAL MATTER ENTITLED TO THE ATTORNEY OF HER CHOICE AS SPELLED OUT BY LAW?

Respondents go to great length to state their views of why O'Neil should not be allowed to represent parties in courts of

limited jurisdiction. But they entirely miss the main point of the whole proceeding. This point is:

> IS KAREN SPARKS, A DEFENDANT BROUGHT BEFORE A COURT OF LIMITED JURISDICTION ON A CRIMINAL MATTER ENTITLED TO CHOOSE (JERRY O'NEIL) TO APPEAR AND ACT FOR HER AS ATTORNEY.

Section 25-31-601 states:

> Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney;

Karen Sparks is a party to litigation in the Whitefish City Court. Under § 25-30-101, MCA, the rules of procedure for justice court also apply to the city courts. Under § 37-61-210 the right to appear by someone that is not a licensed attorney applies to city courts as well as justice courts.

Recently this Supreme Court of Montana ruled in cause number 91-84 that, as a defendant in a criminal action, D.J. Heffner was entitled to rely on § 25-31-601. Similarly, Karen Sparks is entitled to the protections afforded to parties under § 25-31-601 when she is a defendant in a criminal matter. It is her right to appear and act by "attorney". Section 25-31-601 empowers her to have the person of her choice appear for her in courts of limited jurisdiction. Under § 25-31-601, who may be included in her choice of "attorney" is defined as "any person except the constable by whom the summons or jury process was served". The statute is unequivocal that Karen's right to counsel of her choice includes the right to chose "any person": As an exercise of her right to counsel of her choice Karen chose Jerry O'Neil. It doesn't appear she has anyone else available to her. This Court should now direct the Whitefish City Court to honor

that choice.

IV. THE CURRENT SYSTEM FAILED TO PROTECT PETITIONER SPARKS

When Karen Sparks was brought before the Whitefish City Court on the charge of misdemeanor theft the consequences to her were likely to be of major significance. Although it wasn't a jailable offense which would trigger her right to have a court appointed attorney, it still had the ability to deprive her of a major property interest. Karen works for a bank and if found guilty of theft would lose her job. Just being charged with it put her on personal leave without pay. By the time she went to O'Neil for help, she had not received her salary for over thirty days. She was broke.

Judge Johnson refused to appoint an attorney for Karen because she stated on her *Financial Affidavit and Request for Court Appointed Counsel* that she had personal property with a collective value of $15,000.00. But when looking at this request two things are apparent. One, the sum of the items listed only totals $10,550.00.

Emerson TV	$600.00
Microwave	$750.00
Living room furniture	$1,000.00
dining room set	$1,200.00
waterbed	$1,400.00
antique buffet	$2,000.00
washer, dryer	$1,200.00
stove	$250.00
refrigerator	$500.00
woodstove	$1,500.00
humidifier	$150.00

Total	$10,550.00

Two, all the items listed are of such a nature that Karen would suffer serious detriment if she were forced to convert them to cash to retain counsel. It is obvious she has never had to pawn something in order to raise money. Also, from the wording of the *Financial Affidavit*, it is doubtful she understood that the value she should have listed is that which she would be able to raise on a forced sale of the items. It is too bad that she didn't have the help of someone such as O'Neil when she was filling out the affidavit.

In her search for an attorney everyone she approached (prior to O'Neil) demanded a cash retainer of at least $400.00 prior to taking the case. Most of them also quoted a rate of at least $60.00 per hour. She would have had to raise and given at least $1,000.00 to an attorney long before she received another pay check from her employer. To raise this money in the time allowed Karen would have had to pawn her household furnishings or to sell them at auction. She would have been lucky to receive ten cents on the dollar for them. At that rate she would have had to pawn the stove she heated her house with in order to hire an attorney. Would the attorney be able to keep her pipes from freezing?

V. THE WHITEFISH CITY COURT IS DISCRIMINATING AGAINST KAREN SPARKS

Previously, when Larry O'Shaughnessy was brought before the Whitefish City Court on criminal charges, Judge Johnson agreed to let O'Neil defend him. O'Shaughnessy had ample financial means to retain whoever he wanted to defend him. Because he has non-traditional belies he desired to have O'Neil represent him in the Whitefish City Court and requested the Honorable Brad Johnson to allow it. Judge Johnson readily

agreed to let O'Neil represent O'Shaughnessy. Now this same Judge Johnson refuses to let O'Neil help Karen Sparks. Is the difference between allowing O'Neil to represent O'Shaughnessy and refusing to allow him to represent Sparks due to O'Neil's having enough experience by the time of the Sparks trial that the Court thought he might be able to do her some good, or was it because O'Shaughnessy had money and Sparks didn't?

Her right to receive due process and equal protection is being denied to Petitioner Sparks under color of law. It is a violation of Karen's civil rights, similar to the denial of due process by the Virginia magistrates in Pulliam v. Allen, 104 S.Ct. 1970 (1984).

Respondents appear to be arguing that Karen would be allowed to use O'Neil's help if it was of an isolated or casual basis. At what point does O'Neil's help cease being of an isolated or casual basis? When he is versed enough regarding court procedure that Judge Johnson is afraid he will have to give Sparks a fair trial? It doesn't seem fair to allow her to have O'Neil's help as long as O'Neil doesn't know what he is doing - but then deny it to her as soon as O'Neil has made enough court appearances that he knows how the procedure is supposed to work.

VI IT WOULD IMPROVE THE STANDARD OF JUSTICE IN MONTANA TO LET PETITIONERS PREVAIL IN THIS CASE

The Montana Supreme Court knows that the poor are in need of more representation in the courts and it continually attempts to make improvements to the situation. This must be the reason for the Montana Student Practice Rule dated July 22, 1987, (See Rule II.A.3. of the Montana Student Practice Rule). which allows law students at the University of Montana to appear at the first appearance and the initial bond setting for indigents. It is expected that a favorable ruling in this case will

increase the scope of student practice in Montana.

It is not contemplated that judges in Montana's City Courts and Justice Courts will appoint non-licensed persons to aid defendants on jailable offenses over the defendants' objections. In fact, if these defendants received the services of non-licensed persons in any way other than from their own choosing, it would probably be a violation of their due process right to counsel of their choice.

Montana law (25-31-601, MCA) provides a vehicle that Karen Sparks and other defendants appearing before Montana's courts of limited jurisdiction on non-jailable offenses can use to receive some assistance. Hopefully this Court will leave that law in place.

Respondents cite the Application of Montana Bar President, supra (518 P.2d 32) to make the point that "the practice of law is a privilege burdened with conditions." For these conditions, Respondents would include:

A. Protection of the public from unethical practitioners;

B. Continuing legal education;

C. Providing for the availability of legal services to all;

D. Promoting needed legal reform.

Petitioners agree that these are noble goals and would like to help advance them. One of the easiest ways to advance these goals would be to open up the courts of limited jurisdiction to allow non-licensed legal technicians to help those in need.

It certainly would go a long way towards "providing for the availability of legal services to all" and "promoting needed legal reform" for his Court to allow O'Neil and others to help the unrepresented in the city courts and justice courts of the State of Montana In Johnson v. Avery, 393 U.S. 483, the Court ruled that when a prisoner was unable to retain licensed counsel that

he was entitled to be represented by well qualified lay counsel. Petitioner Sparks was unable to retain licensed counsel in this case. Shouldn't Karen Sparks and others that are unable to have a licensed attorney represent them in city and justice courts have equal protection as that enjoyed by convicted felons?

As for the "protection of the public from unethical practitioners", O'Neil has previously made a public statement to the effect that if he were allowed to represent people in the state's justice courts, that he would be willing to use that forum to take cases against attorneys for unethical practices. This would provide an expeditious method of resolving minor disagreements between the public and the bar. Not being a licensed attorney, the presence of O'Neil in such a role would probably be perceived by the public as evidence that unethical practice of attorneys is not protected by any monopoly perceived to be held by the bar association.

As for "continuing legal education", it would help if the present system were changed so that the Montana Board of Continuing Legal Education would grant continuing legal education credits to other than licensed attorneys. Maybe such credits could apply towards the requirements mandated before one may take the bar examination. At the present Montana refused to allow CLE credit to those that are not licensed attorneys.

O'Neil is a member of the Association of Family and Conciliation Courts. As such, he attended a seminar in Portland in 1989. Attendance at the seminar was approved for continuing legal education credits. O'Neil applied for such credits and was refused by the Montana Board of Continuing Legal Education. See Exhibit A. O'Neil has also attended a seminar on January 16, 1990, presented by the National Business Institute, Inc., titled "Administration of the Estate in Montana" and a seminar by the same organization relating to dissolution of marriage. He is unable to receive recognition from the Montana Board of Continuing Legal Education that he participated in these

educational programs. If the Court is really interested in promoting continuing legal education it certainly has the means of providing recognition for those that participate in such functions.

The Public Protection Committee of the Office of Professional Standards of the State Bar of California made an investigation regarding the provision of legal services by non-attorneys in California. On April 22, 1988, the committee published its report with its recommendation that such services were of value to the public and should be allowed to continue for the benefit of the public. See Exhibit B. Such services are also essential for the protection of the poor in Montana.

To promote the concerns put forth by Respondents, Petitioner O'Neil should be allowed to help those that need his help in the justice courts and city courts of Montana.

VII. IS IT PERMISSIBLE TO CHOOSE AN ATTORNEY THAT IS FAMILIAR WITH THE COURT SYSTEM?

Prior to locating O'Neil, Karen Sparks was in a bad situation. She needed an attorney. She was unable to find one that she could retain with the money available to her. Therefore she was forced to seek for help elsewhere. When she approached O'Neil she was looking for someone with experience in the court system. She didn't want just any man off the street or any relative. She didn't want someone on a casual basis. She was serious. She wanted someone with experience. She wanted someone that had the ability to help her. It doesn't seem right to deny her the services of O'Neil for the very reasons that she sought him out for.

The State maintains that section 25-31-210 MCA authorizes a layperson to represent a party in justice and city courts only when such appearance is incidental to the party's desire to appear pro se. They are ignoring the fact that section 25-31-601 states:

> Parties in justice's court may appear and act in person or by attorney . . .

Section 25-31-601, MCA does not state that parties in justice's court may appear and act "with co-counsel of their choice". It is clear in that it gives parties the choice to appear either pro se, or not wishing to do that, to appear by either a licensed or an unlicensed attorney.

Section 25-31-601, M.C.A. (R.C.M. 1947, 93-6704), has been in effect since before Montana became a state. This law governing practice in courts of non-record has been in effect, only slightly changed, since it was first passed by Montana's First Legislative Assembly which convened at Bannack, Montana on December 12, 1864. It has never been worded in such a way that would indicate it was meant only to provide co-counsel for those choosing to appear pro se. When it was first passed it was worded:

> Parties in justice's court may prosecute or defend in person or by attorney; and any person on the request of a party may act as attorney, except that the constable by whom the summons or jury process was served shall not appear or act on the trial on behalf of either party.

This Court, under its exclusive authority to promulgate rules relative to the practice of law under Montana's 1972 Constitution, re-affirmed Section 25-31-601 on July 16, 1973, when it issued its order which stated:

> Under Art. VII, Sec. 3, Constitution of the State of Montana of July 6, 1972, this Court adopts all its rules of appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members, those legislative acts

> appearing in RCM 1947 and Montana Rules of Civil Procedure and Montana Rules of Appellate Procedure and rules for admission to the bar and canons of ethics as they were in effect as of July 1, 1973 or to become effective by legislative action by approval of the Governor at a later date as those acts appear in the session laws of 1973.

It probably wasn't intentional, but by the above order the Montana Supreme Court adopted § 25-31-601 as a protection for litigants in justice court. Section 25-31-601 has served the less affluent litigants in Montana's courts of limited jurisdiction for well over 100 years. Shouldn't Karen Sparks be allowed its protection when it is the only statute that will provide her with any representation at all in this case?

A person's right to be represented by counsel is a basic right. In the Justice and City Courts of Montana this right includes their right to have anyone of their choosing appear for them. This right shouldn't be denied them just because the judicial system doesn't want commercial corporations to appear without a licensed attorney in any court. Defendants', including Defendant Sparks', rights to due process as stated by the United States Supreme Court are:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (emphasis in the original).
>
> In re Oliver, 333 U.S. at 273, 92 L. Ed. at 694; quoted in Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530.

Therefore this Court should allow Karen Sparks to choose Jerry O'Neil as the counsel of her choice in the City Court of Whitefish as statutorily allowed under section 25-31-601, MCA.

DATED: Dec 2, 1991

s/ Karen Sparks

s/ Jerry O'Neil

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that today I mailed a copy of the foregoing PETITIONERS' RESPONSE TO RESPONDENTS' BRIEFS AND TO THEIR MOTION TO DENY PETITION to:

Tim Cooper
Whitefish City Attorney
c/o HEDMAN, HILEMAN & LACOSTA
433 2nd St.
Whitefish, MT 59937

George Schunk
Assistant Attorney General
Justice Building
215 North Sanders
Helena, MT 59620

DATED: Dec 3, 1991

s/ Jerry O'Neil

MONTANA BOARD OF CONTINUING LEGAL EDUCATION

November 17, 1989

Mr. Jerry O'Neil
P.O. Box 575
Kalispell, Montana 59903

Dear Mr. O'Neil:

In reply to your letter of November 10, 1989, please be advised that the only CLE credits you can claim toward your Montana requirement are those earned after your date of admittance to the Bar. Since you have not been admitted to practice law in the State of Montana, the credits referred to in your letter would not be applicable to any CLE requirement you may have in the future, should you become a member of the State Bar of Montana.

I hope this answers your inquiry. Please don't hesitate to contact the undersigned if you have any further questions in this regard.

Sincerely yours,

s/ Gino Little
GERALDINE "GINO" LITTLE
MCLE Administrator

GDL/s

P.O. Box 577 • Helena, MT 59624 • 406-442-7660

EXHIBIT A

REPORT OF THE

PUBLIC PROTECTION COMMITTEE

Office of Professional Standards
State Bar of California
555 Franklin Street
San Francisco, California 94102

April 22, 1988

SUMMARY

The Public Protection Committee, following extensive investigation and analysis, has concluded that the dramatic growth in the numbers and types of services offered by non-lawyers to persons with law-related problems reflects society's response to needs not met by California lawyers. The providers of these services are many and varied, as are the identifications they use. In this report, we refer to them as "legal technicians."[1] Because there is a demonstrated need for the types of services that legal technicians offer, our Committee concludes that there

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[1]"Legal technician" has been used throughout this report and in the legislation contained in it to designate a non-lawyer who provides law-related services to members of the public. the Committee struggled to develop a phrase which would adequately describe these individuals and which would not be confused with those used to identify non-lawyers who provide services only to members of the State Bar. The term "legal technician" was chosen after much discussion. The Committee would particularly welcome comments or suggestions concerning this designation.

is a benefit to the public from their existence. At the same time, we also conclude that there is a risk of public harm from the uncontrolled activities of non-lawyers who provide legal assistance and advice to the public.

It is probable that a court of law applying established standards for what constitutes the practice of law would conclude that many legal technicians are engaged in the unauthorized practice of law. We have concluded, however, that "unauthorized practice of law" is a concept no longer capable of definition or enforcement. Moreover, specifically with respect to legal technicians, we believe it would be unwise for the State Bar to undertake under the guise of unauthorized practice the policing of activities that, if injurious to the public, are essentially consumer fraud.

We recommend that the State Bar actively support legislation that (1) makes it unlawful for a person who is not an active member of the State Bar to claim to be a lawyer, (2) requires the registration of legal technicians, (3) requires legal technicians to disclose that they are not lawyers, and (4) renders legal technicians liable, both civilly and criminally, for misfeasance and nonfeasance.

MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY

In Re the Marriage of: ERNEST B. WILCOCK, Petitioner (Respondent) and MARLA M. WILCOCK, Respondent (Petitioner).	No. DR-97-536(B) No. DR-97-486(B) TRANSCRIPT OF PROCEEDINGS

Held Before the Honorable Katherine R. Curtis,
District Court Judge

Taken at Flathead County Justice Center
920 South Main Street
Kalispell, Montana 59901
Wednesday, December 17, 1997

APPEARANCES:

EARNEST B. WILCOCK
Appearing Pro Se

PETER F. CARROLL, ESQ.
P.O. Box 2536
Kalispell, Montana 59903-2536
Appearing on behalf of the Respondent

Reported by Nancy Skurvid, RPR, Official Court Reporter
(406) 758-5664

WEDNESDAY, DECEMBER 17, 1997

THE COURT: Next is DR-97-536(B), the Wilcock matter.

MR. CARROLL: Your Honor, Mr. Wilcock is downstairs, I guess, with the sheriff.

THE COURT: Oh, yeah.

MR. CARROLL: Maybe we should pass this over.

THE COURT: All right. Sounds good.

MR. CARROLL: Should I have the clerk call?

THE COURT: I don't have a clue that anybody asked him to come up - - or asked - - or asked them to bring him up for this hearing, but I think he needs to be here, so maybe the clerk can assist you in that regard.

MR. CARROLL: Okay

///

///

///

THE COURT: Mr. Carol, are we going to see Mr. Wilcock?

MR. CARROLL: Your Honor, I had the clerk call down, and they said they'd bring him up.

THE COURT: Okay.

MR. CARROLL: I don't know - - I don't know when they'll bring him up. I asked them to do so right away.

THE COURT: Okay.

MR. CARROLL: If the Court please, I can go check and see with Cathie.

THE COURT: That would be fine. Thank you.

MR. CARROLL: He's on his way.

THE COURT: Okay. Mr. Carroll, is there a dissolution case pending with regard to these two parties?

MR. CARROLL: There is, Your honor.

MR. CARROLL: I saw in your - - in Mr. Wilcock's Affidavit, reference to a Summons and Petition for Dissolution of Marriage, but I don't see any reference

anywhere to the cause number.

MR. CARROLL: It's a DR-97-486(B), Your Honor.

THE COURT: And that's with Ms. Wilcock as Petitioner and he is the Respondent?

MR. CARROLL: That's Correct.

Mr. O'NEIL: In the divorce, Marla is the Petitioner.

THE COURT: Good morning. Sorry for the last-minute notice.

Okay. This is Cause No. DR-97-536(B), in Re the Marriage of Ernest B. Wilcock, Petitioner, and Marla M. Wilcock, Respondent.

Petitioner is present, at this point representing himself. Respondent is present with her counsel, Peter Carroll.

Mr. O'Neil, I cannot admit you to the practice of this court. The laws of the State of Montana do not allow me to do that. You may stay where you are, you may advise Mr. Wilcock in whatever manner you and he deem appropriate, but he's got to speak for himself, okay?

I think the thing that's set for hearing this morning is the Respondent's Motion to Quash the Conciliation Order issued in DR-97-536)B). Right, Mr. Carroll?

MR. CARROLL: That's correct, Your Honor. The motion has been briefed. And I think the issues are twofold. I've looked through the statutes, Your Honor, and I'm not sure that a conciliation court has been established in this district. And, therefore, I don't think the Court has any jurisdiction to order any conciliation.

Notwithstanding that, which I think is a major error, on the plain reading of 40-3-127(3), Mrs. Wilcock assures me there is no possibility of reconciliation, even a reasonable prospect, and that, therefore, the conciliation is largely a delay of the issues in the dissolution case that's pending.

THE COURT: Okay. You may be right with regard to the provisions of Title 40, Chapter 3 concerning the establishment of the conciliation court.

While not being one necessarily to stand on history, we've been doing it this way for a long time. And if we've been doing it wrong, I guess we've been doing it wrong. But I'm disinclined, frankly, to say to someone we the judges haven't done what we were supposed to do, so you don't have any conciliation options, and thereby impose upon myself the responsibility to follow through with a lot of the provisions of this chapter before anybody can file a conciliation petition. So I'm not gonna decide this on the basis of that.

I do notice, from the provisions of Section 40-3-111, that the court needs to make a determination as to whether or not the reconciliation of the spouses or amicable adjustment of the controversy can probably be achieved. And I assume that it's to that finding required of the court that your second argument addresses, which is, I assume - - would be Ms. Wilcock's testimony that it can't - - that amicable - - or that reconciliation of the spouses cannot be achieved.

MR. CARROLL: That's correct, Your Honor. Ms. Wilcock's Affidavit is submitted to the Court for your review. There are circumstances in this situation that are extenuating.

Mr. Wilcock, he has been accused of a crime. He's not been convicted at all yet, but is it a serious - - of-a serious nature involving one of the minor children in the family. But he had a prior sex offense in the State of Utah, which Ms. Wilcock stuck with him through that process, and she's indicated that she's just at the end of the line here.

And I don't know - - she tells me there's no possibility of reconciliation, and I don't know how - - how you could put something to the back like that.

THE COURT: Okay. The - - she also indicates in her Affidavit, Mr. Carroll, that during the prior - - during his time in prison on the prior offence, there was a long process of counseling. Just one minute. I'll hear from you.

MR. CARROLL: I understand that was for Mr. Wilcock, Your Honor.

THE COURT: Okay. And apparently she now feels like there's good chance that didn't do any good?

MR. CARROLL: That's what it appears.

THE COURT: Now, Mr. Wilcock, let me say something to you, okay? Remember, you're charged with a crime, and remember that you have the right to remain silent about that charge. And remember, if you choose to make statements about that, then you're giving up your right to remain silent, and you could risk incriminating yourself, okay? I don't want you to do that. I assume you have had counsel appointed to represent you in your criminal case?

MR. WILCOCK: Yes, ma'am.

THE COURT: And I don't want you to at all address that case in the absence of your appointed attorney because you may say something that he or she would advise you not to say.

MR. WILCOCK: Yes, ma'am.

THE COURT: Okay?

MR. WILCOCK: My - - there's two things I'd like to address to the Court. One, I would like to - - due to the fact that Mr. O'Neil's not being appointed or recognized as my attorney in this hearing, I would like to object - - officially object to this hearing due to the fact I do not have legal counsel representing me and I do not know the law. Therefore, I basically am not capable of representing myself.

Also I would like to ask the Court - - I don't know if my wife can be called to the stand, or whatever. But one of the things my wife has told me when she first said she was gonna file for the divorce is that she felt that I was gonna go to prison for the rest of my life and she could not wait for me.

Therefore, I would like to ask the Court to ask her if - - if I'm found innocent of this charge, if there is reconsolidation (sic) of the marriage, if she feels the marriage can be reconsolidated (sic).

THE COURT: Okay. Fair enough. And ask her that, Mr. Wilcock.

I want to just amplify a little bit on what I said with regard to Mr. O'Neil. I'm sure he has told you he's not a licensed attorney.

MR. WILCOCK: Yes, ma'am.

THE COURT: Okay. The difficulty is that this court has no way to differentiate between Mr. O'Neil, who may be qualified to represent you even though he's not a licensed attorney, and Joe Blow on the street, who's not qualified to represent you but is likewise not a licensed attorney.

So the difficulty is that once the Court allows someone who's not a licensed attorney to represent someone, where do you draw the line? And, frankly, I don't see the line can be drawn anywhere.

And No. 2, this Court doesn't have the resources to do that line drawing on a case by case basis, even if it could be done. We would obviously have to look into the background and the qualifications and the training and the experience of each person who said they wanted to come in here to represent someone but they were not a licensed attorney.

Now, that's the reason we have licensing for attorney, is so that some board somewhere can look at those qualifications and say yes, you get the rubber stamp 'cause you've graduated from law school and passed the bar exam, or no, you don't get the rubber stamp because you haven't done that.

And recognize, as far as nuts and bolts are concerned, what we do here in the courtroom - - it must be somewhat arbitrary, but it's a necessary evil because there's no way that this Court has the resources to start looking into the back-ground and the experience, and that sort of thing, of everyone who says they might want to represent someone else.

Frankly, I have people who are in prison in Deer Lodge saying they want one of their fellow prisoners to represent them. Now what would I do about that? If I let Mr. O'Neil, who's not a licensed attorney, represent you, then I got to look at that guy and say, Okay, well, what's your experience and what's your

qualifications, even though you're a convicted felon can't represent someone.

So that's the - - that's the reason for my ruling with regard to Mr. O'Neil. And it's not said for purposes of asking you for your comments or further argument. I just want to hopefully understand why that has to be the way it is. Okay?

Secondly, Ms. Wilcock - -

MS. WILCOCK: Yes, ma'am.

THE COURT: - - I think Mr. Wilcock asked a legitimate question. And that is, if you take what can only be described from him at this point as the best case scenario and he's acquitted or the charges were dismissed against hem, is it still your belief and would it be your testimony that there is no chance that you and he can reconcile your marriage?

MS. WILCOCK: That's right, there is no chance. Even if he was found innocent, I still do not want to stay married.

THE COURT: Okay. Mr. Wilcock, do you want Ms. Wilcock to testify to that - - effect?

MR. WILCOCK: I guess not. I would request, due to the fact that I do not have counsel, then that - - I would request, before the hearing continues, that the Court be asked to appoint me counsel.

THE COURT: Okay. Mr. Wilcock, we don't have procedures in Flathead County for appointing counsel for people in civil cases, which is what this is. Okay? Obviously, in criminal cases we do because you've had a lawyer appointed to represent you.

But in civil cases, cases concerning dissolution of your marriage and matters related to your children, we don't have the resources for the taxpayers of Flathead County to pay for another lawyer for you. Okay?

So you're welcome to represent yourself. You're welcome to have Mr. O'Neil advise you. He can prepare documents for you. He knows what practicing law is, what practicing law isn't, and so, you know, he can advise you. He can't speak for you.

But you strike me as someone who is fairly capable of speaking for himself.

You have the right to the representation of a licensed attorney, too, you know, and I want to give you the opportunity to look into that if that's what you'd like to do. Okay? But I can't appoint counsel to represent you. Okay?

So, Mr. Carroll, has Ms. Wilcock done anything with regard to the order referring the conciliation to Family Court Services?

MR. CARROLL: I don't believe so, Your Honor.

THE COURT: Okay. Let's leave - - let's leave that order stayed essentially for the time being, okay, so that Ms. Wilcock, you don't have to do anything in terms of contacting Family Court Services.

I'm gonna give Mr. Wilcock two weeks to get a lawyer and to have that person - - and I know it's difficult for you because you're in custody and, you know, I know that makes it more difficult for you, but there's nothing I can do about that - - nothing I'm gonna do about it anyway. I'll give you two weeks to get a lawyer and to have that person file something with the Court in this file letting me know that that person now represents you.

And if your lawyer wants to have another hearing on Ms. Wilcock's Motion to Quash the Conciliation Order, then I'll set one, and I'll set it right away, and you can be here, and he - - your lawyer can be here, and Mr. Carroll and Ms. Wilcock will be here, and I'll make a determination at that time.

If, on December 31st, I do not have in this file - - and that's DR-97-536(B), okay, the conciliation file. If I do not have, in this file, a notice from a licensed attorney on your behalf that that person represents you and that that person wants a hearing on the Motion to Set Aside the Conciliation Order, then I'm gonna entertain an order, which I'm sure Mr. Carroll will prepare and submit between now and then, quashing the Conciliation Order and letting this matter go forward. Do you

understand?

MR. WILCOCK: Yes, ma'am.

THE COURT: Any questions that I can answer for you?

MR. WILCOCK: No.

THE COURT: No? Okay. thank you.

MR. CARROLL: Thank you, Your Honor.

THE COURT: Mr. Carroll, I'll let you bring it back to my attention at that time, if you will.

MR. CARROLL: I'll do that, Your Honor.

THE COURT: Okay. Thank you.

MR. CARROLL: Thank you, Your Honor.

THE COURT: I am, for you, Mr. Wilcock, in the dissolution case, gonna sign the order waiving your filing fees. Is there a proposed response here? Mr. O'Neil, do you know, is there a response here?

Mr. O'NEIL: I don't know. I think he moved for reconciliation rather than - - no, wait, there is - -

THE COURT: Answer. I see the Answer. Okay.

Mr. O'NEIL: I don't know if we filed a motion to the response yet, Your Honor.

THE COURT: It hasn't been filed yet because I haven't waived the filing fees yet. I'm gonna go ahead and waive the filing fees.

I'm going to allow the Answer - - I'm gonna allow all of these documents that are ready to be filed to be filed. And by that what I mean is, there's a decree here that obviously is not ready to be filed 'cause it has to be signed. And a parenting plan, it wouldn't be filed. But all of those will be placed in the file, and the ones that can be filed will be filed.

But I'm going to sign the order denying Respondent's request to be represented by you, Mr. O'Neil. So that in the future, documents that are prepared for filing need to be in Mr. Wilcock's name. You're welcome to be there with him at any court hearings, sit with him, advise him however you choose. Does that seem confusing enough?

MR. CARROLL: I'm not sure what to do in this situation, Your Honor. I don't think anybody's given us good guidance on it.

THE COURT: I know. I agree. I know Mr. Wilcock finds himself in a tough spot, but we'll deal with it as best we can. Okay. Thank you.

(Whereupon, the proceedings were concluded at 9:27 a.m.)

CERTIFICATE OF COURT REPORTER

STATE OF MONTANA)
: ss
County of Flathead)

I, NANCY J. SKURVID, Registered Professional Reporter and Notary Public duly qualified in and for the State of Montana, residing in Kalispell, Montana, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause.

I further certify that the foregoing pages of this transcript represent a true and accurate transcription of my original stenographic notes.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of February, 1998.

s/ Nancy J. Skurvid, RPR
Nancy J. Skurvid, RPR
Official Court Reporter
Residing in Kalispell, Montana

Jerry O'Neil, Advocate & Counselor
Licensed in Blackfeet & CS&K Tribal Courts
202 Helena Flats Road
Kalispell, Montana 59901-2429
406-752-8903
Advocate for Respondent

MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY

UPON THE PETITION OF: ERNEST BRENT WILCOCK, Petitioner, and MARLA MAUDE WILCOCK, Respondent.	Cause No. DR-97-536(B) **BRIEF ON MOTION REGARDING REPRESENT-ATION**

1. Ernest B. Wilcock is currently incarcerated in the Montana State Prison, having been sentenced to serve 50 years on May 17, 1998.

2. After Mr. Wilcock was arrested and confined to jail, his wife, Petitioner Marla M. Wilcock, filed a petition for dissolution of the parties marriage.

3. Respondent is unversed in legal matters and has various restrictions upon the services he needs the use of in order to properly represent himself in this cause.

4. Respondent previously attempted to contact by phone over one-half of the attorneys listed in the Kalispell telephone books that advertise they practice family law. Because

Respondent is in jail he was forced to phone collect and some of the listed attorneys refused to accept his phone call.

5. While Respondent has some personal property, he does not have any cash with which to pay an attorney. The major assets of the marriage include a 1979 pickup, which he has now given to Mr. O'Neil for his services; stocks at Wal-Mart, which likely have a value of about $1,200.00, which are currently in Wife's possession; an antique bed and dresser which Wife is currently using as furniture; an antique gramophone which is in Wife's possession and an antique 45-70 rifle, of minimal value.

6. Respondent phoned Jerry O'Neil who advertises as a typing service in the yellow pages. Jerry O'Neil was willing to accept Respondent's collect phone calls and is the only person Respondent has located who is willing to accept Respondent's personal property in payment of his services.

7. While Jerry O'Neil is not licensed to practice law in the State of Montana, he is licensed as an advocate and counselor before the Blackfeet Tribal Court and before the Confederated Salish and Kootenai Tribal Court. These courts follow the Montana statutes which relate to family law. In addition, Jerry O'Neil has drafted, lobbied for, and succeeded in getting enacted as law in the Montana Legislature, statutes regarding dissolution of marriages. Mr. O'Neil also has participated in the formulation of the Montana Child Support Guidelines. Jerry O'Neil is knowledgeable about Montana laws relating to families and divorce.

8. Jerry O'Neil is the only advocate Respondent has available and Respondent desires that Jerry O'Neil be allowed to represent him in this cause.

9. Justice Douglas, concurring in Johnson v. Avery, 393 US 483, stated:

> [55]
>
> In that view, which many share, the preparation of these endless

> petitions within the prisons is a useful form of therapy. Apart from that, their preparation must never be considered the exclusive prerogative of the lawyer. Laymen -- in and out of prison -- should be allowed to act as "next friend" to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar.
> [56]
>
> The cooperation and help of laymen, as well as of lawyers, is necessary if the right of "reasonable access to the courts" is to be available to the indigents among us.

10. According to Bounds v. Smith, 430 US 817 (1977), regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. This is also iterated in Procunier v. Martinez, 416 US 396, 419, 94 S.Ct. 1800, 1814, 40 L.Ed.2d. 224 (1974).

11. The Supreme Court has also recognized that prisoners "have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821, 52 L.2d.2d 72, 97 S.Ct.1491 (1977). This right has been characterized as "fundamental." Id. at 828. The Court has described it as an element of both the First Amendment right to petition the government for redress of grievances, Hudson v. Palmer, 468 U.S. 517, 522, 82 L.Ed.2d 293, 104 S.Ct. 3194(1984),Cruz v. Beto, 405 U.S. 319, 321, 31 L.Ed.2d 263, 92 S.Ct. 1079 (1972) (per curiam), and the Due Process clause, Wolff v. McDonnell, 418 U.S. 539, 579, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974). It appears in significant part to be based on the same concerns that animated Boddie. Because prisoners are typically indigent, often ignorant and illiterate, and due to their confinement generally unable to avail themselves of traditional modes of legal assistance, the state must provide them with law libraries and allow them access to some form of legal assistance. See Bounds, 430 U.S. at 821-25. Like the filing fee cases, the prisoner cases are founded in large part on the importance of the rights concerned and the

prisoners' inability to vindicate them through non-judicial pathways.

12. In the interests of justice, Respondent's motion to be represented by Jerry O'Neil should be granted.

DATED: August 24, 1998

s/ Jerry O'Neil
Advocate for Respondent

Jerry O'Neil, Advocate & Counselor
Licensed in Blackfeet & CS&K Tribal Courts
202 Helena Flats Road
Kalispell, Montana 59901-2429
406-752-8903
Advocate for Petitioner

MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY

UPON THE PETITION OF: ERNEST BRENT WILCOCK, Petitioner, and MARLA MAUDE WILCOCK, Respondent.	Cause No. DR-97-536(B) AFFIDAVIT OF ERNEST B. WILCOCK

STATE OF MONTANA)
: ss.
County of Flathead)

Comes now Respondent Earnest B. Wilcock, who first being duly sworn upon oath, deposes and states as follows:

1. Respondent is presently incarcerated in the Flathead County jail and it appears likely that Respondent will remain incarcerated there for the immediate future.

b. Respondent has been served a summons and petition for dissolution of marriage in this cause.

c. Respondent is not versed in marital law and is not capable of representing himself in this action.

d. Respondent has attempted to contact by phone over one-half of the attorneys listed in the Kalispell telephone book

that advertise they practice family law. Because Respondent is in jail he has been forced to phone collect and some of the listed attorneys refused to accept his phone call. None of the contacted attorneys have agreed to represent Respondent in this case.

e. While Respondent has some personal property, he does not have any cash with which to pay an attorney. The major assets of the marriage include a 1979 pickup with camper, in which it is likely Respondent will need to reside when he is released from jail; stocks at Wal-Mart, which likely have a value of about $1,200.00, which are currently in Wife's possession, an antique bed and dresser which Wife is currently using as furniture; an antique gramophone which is in Wife's possession and an antique 45-70 rifle, also in Wife's possession. Respondent believes the best way to pay attorneys without depriving Wife and the children of the essentials of life, and while keeping Wife's retirement intact, would be to use the antique 45-70 rifle.

f. Respondent phoned Jerry O'Neil who advertises as a typing service in the yellow pages. Jerry O'Neil was willing to accept Respondent's collect phone calls and is the only person Respondent has located who is willing to accept Respondent's personal property in payment for his services.

g. While Jerry O'Neil is not licensed to practice law in the State of Montana, he is licensed as an advocate and counselor before the Blackfeet Tribal Court and before the Confederated Salish and Kootenai Tribal Court. These courts follow the Montana statutes which relate to family law. In addition, Jerry O'Neil has drafted, lobbied for, and succeeded in getting enacted as law in the Montana Legislature, statutes regarding dissolution of marriages. Mr. O'Neil has also participated in the formulation of the Montana Child Support Guidelines. Jerry O'Neil is knowledgeable about Montana laws relating to families and divorce.

h. Jerry O'Neil is the only advocate Respondent has

available and Respondent desires that Jerry O'Neil be allowed to represent him in this cause.

The foregoing facts and matters are true, accurate and complete, except as to the matters therein stated on information and belief and, that as to those, Affiant believes them to be true.

s/ Ernest B. Wilcock
Ernest B. Wilcock

The foregoing *Affidavit of Ernest B. Wilcock* was subscribed and sworn to before me this _____ day of _____, 1997, by Ernest B. Wilcock.

NOTARY PUBLIC FOR THE
STATE OF MONTANA
Residing at _____
My Commission expires _____

STATUTORY PROVISIONS INVOLVED

STATUTES - Montana Code Annotated

MCA § 37-61-201 Who considered to be practicing law. Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession for the purposes of parts 1 through 3 of this chapter shall be deemed practicing law.

MCA § 37-61-210. Penalty for practicing without license. If any person practices law in any court, except a justice's court or a city court, without having received a license as attorney and counselor, he is guilty of a contempt of court.

RULES - Montana Commission on Unauthorized Practice of Law

RULE TWO. DEFINITIONS

Rule 2(h) Unauthorized Practice of Law. "Unauthorized Practice of Law" means the practice of law without being first duly qualified, as prohibited by statute, court rule, or case law of the State.

Rule 8(a) Civil Injunctive Proceedings.

(1) Complaints shall be by written petition filed in the commission's name with the district court in the district in which the respondent resides or maintains his or her principal place of business or where the alleged violation occurred.

(2) Each such petition shall be processed in the district

court in accordance with the Montana Rules of Civil Procedure and the laws of the State of Montana.

(3) The commission may request the county attorney in the county where the alleged violation occurred to file and pursue the civil injunctive proceeding.

(4) If the county attorney does not act or is unable to act, the commission may contact the attorney general and request that the attorney general pursue the alleged violation.

(5) The penalty for violation of injunction shall be that provided in § 37-1-318, MCA, corresponding with the statutory regulatory structure for regulated entities within the purview of the Department of Commerce.

Rule 8(b) Civil Contempt Proceedings.

(1) A civil contempt proceeding for unauthorized practice of law, as provided by § 37-61-210, MCA, or other applicable statute or law, shall be prosecuted in the manner provided by § 3-1-501 et seq., MCA.

(2) The procedure and punishment for a civil contempt shall be provided by § 3-1-501 et seq., MCA.

(3) Nothing set forth herein shall be construed to prohibit or limit the right of the district court to issue a permanent injunction in lieu of or in addition to any punishment imposed for a civil contempt.

(4) The commission may request the county attorney in the county where the alleged violation occurred to file and pursue the civil contempt proceeding.

(5) If the county attorney does not act or is unable to act, the commission may contact the attorney general and Request that the attorney general pursue the alleged violation.

(c) Criminal Contempt Proceedings.

(1) If a respondent violates a court-ordered injunction, the commission may request the county attorney in the county where the alleged violation occurred to prosecute the

respondent for criminal contempt, pursuant to § 45-7-309, MCA.

(2) Once the commission has recommended prosecution to the county attorney, the commission shall take no further action unless the county does not act or is unable to act. In that event, the commission may contact the attorney general and request that the attorney general pursue the alleged violation.

IN THE SUPREME COURT OF MONTANA

MONTANA SUPREME COURT COMMISSION ON THE UNAUTHORIZED PRACTICE OF LAW, Petitioner and Respondent, vs. JERRY O'NEIL, On Behalf of Himself, His Clients and His Constituents, Respondent and Appellant, vs. THE MONTANA STATE BAR ASSOCIATION, a Trade Association Integrated with the Montana Supreme Court. Defendant and Respondent.	No. 04-857 **APPELLANTS' OPENING BRIEF**

Appealed from the Montana Eleventh Judicial District
Honorable Debra Kimberly Christopher, Presiding

Jerry O'Neil
985 Walsh Road
Columbia Falls, MT 59912
406-892-7602
Representing Appellants

David A. Hawkins
Attorney at Law
Commission on UPL
PO Box 577
Helena, Montana 59624
Representing UPL

Stephen C. Berg, Attorney at
Law
PO Box 3038
Kalispell, Montana 59903
Representing Respondent
State Bar of Montana

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MCA §37-61-201	1, 2, 4, 6, 23, 25 27, 30, 32, 39, 40, 42

MCA §37-61-210	1, 2, 4, 6, 25, 28, 39, 42
United States Code	
25 U.S.C. §1911(d)	34
Other Authorities	
***Black's Law Dictionary, Fifth Edition*, West Publishing Co.**	16

ISSUES PRESENTED FOR REVIEW

I. Was O'Neil's *Counter-Claim* filed timely when filed with the Court's permission and the opponents' agreement?

II. Was it an abuse of discretion and clear error for the Court to enter a partial summary judgment when evidence presented at the hearing and by affidavit and deposition reveal conflicts and contradictions constituting a genuine issue of material facts which should have been submitted to the jury?

III. When demand was properly made in this case, should the mixed questions of law and fact been reserved to the jury as a matter of right under ***U.S. v. Gaudin, Apprendi v. New Jersey,*** and related cases?

IV. Are MCA § 37-61-201; MCA § 37-61-210; Rule 2(h), Rules of the Commission on UPL; the District Court's "indicia of the practice of law"; or the January 7, 2005 *Judgment and Permanent Injunction* based on these statutes, rules and indicia, defined specifically enough to empower a court to hold a person in contempt for violation of either the statute, rules, or the District Court's *Judgment and Permanent Injunction*, or are they each both unconstitutionally void for vagueness and overbroad and over-inclusive under ***Papachristou v. Jacksonville*** and ***Grayned v. City of Rockford,*** especially when

no finding was made that any harm has resulted or is likely to result from Appellants' activities?

V. Did the UPL Commission and the Montana Supreme Court and the District Court exceed their jurisdiction when they interpreted MCA §§ 37-61-201, 37-61-210 and created Rule 2(h), Rules of the Commission on Unauthorized Practice of Law to apply to Appellants' dealings with the general public outside of court?

VI. Did the Court exceed its authority and abuse its discretion when it entered an overbroad and vague *Judgment and Permanent Injunction* which in effect constitutes an indefinite, potentially lifetime sentence of court supervised probation during which O'Neil is forbidden to perform constitutionally protected acts?

VII. Is a heightened standard of review of the enforceability of MCA § 37-61-201; MCA § 37-61-210; Rule 2(h), Rules of the Commission on UPL; and the January 7, 2005 *Judgment and Permanent Injunction* required?

STATEMENT OF THE CASE

On January 7, 2005, the District Court, after a wrongful summary judgment ruling and an improper denial of a jury trial, entered a *Judgment and Permanent Injunction* stating that O'Neil "may not engage in the practice of law" and that:

> The court shall consider the following as indicia of the practice of law:
>
> a. The giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.
>
> b. Selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.

c. Appearing, or attempting to appear, as a legal representative or advocate for others in a court of this state.

d. Negotiating the legal rights or responsibilities of others.

e. Holding one's self out or advertising - - services in a manner that would reasonably mislead the public to believe that one is an attorney, or otherwise licensed or certified legal advocate in the courts of the State of Montana. [The Court indicated that advertising the fact he is licensed in the Blackfeet Tribal Court would mislead the public.]

4. These indicia are not all-inclusive, but are factors that the court may consider.

The *Judgment and Permanent Injunction* is overbroad, vague and prohibits O'Neil from undertaking activities which are constitutionally protected.

NATURE OF THE CASE

The Montana Supreme Court Commission on the Unauthorized Practice of Law (COUPL) sought an injunction against O'Neil. O'Neil responded with a counterclaim for conspiracy against COUPL and the Montana State Bar Association (State Bar) alleging Defamation Involving Profession, Tortious Interference with Contract, and Privacy and demanding a jury trial.

O'Neil produced evidence that he is a duly licensed attorney with the Blackfeet Tribal Court on the summary judgment motion and at the trial. The court below granted COUPL's and State Bar's motions for Summary Judgment, thus dismissing the counterclaim, stating that O'Neil was not licensed to practice before the Blackfeet Tribal Court as an attorney and that Respondents' act of informing third parties that O'Neil was not an attorney licensed by the Blackfeet Tribal Court was not false and therefore not libelous. Since O'Neil did submit

adequate evidence to the Court establishing that he **is** licensed as an attorney with the Blackfeet Tribal Court, the counterclaim needs to be reinstated and the case submitted to a jury trial.

Appellants also challenges MCA §§ 37-61-201, 37-61-210, and COUPL Rule 2(h) and the *Judgment and Permanent Injunction* entered, for being over broad and unconstitutionally vague.

Appellants also challenge the authority of the Montana Supreme Court under the Montana Constitution, Article VII, Section 2, Subsection (3), to regulate activities outside of the courtroom by those who have not submitted to the Court's jurisdiction.

DISPOSITION BELOW

The court below granted Respondents' summary judgment on O'Neil's counterclaim, denied the request for jury trial, proceeded with a bench trial and then issued an injunction against O'Neil.

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

1. O'Neil is licensed to practice law before the Blackfeet Tribal Court System and has been so licensed since 1984. His main area of practice is family law.
2. O'Neil is a state senator and is authorized to discuss the law with the public.
3. O'Neil has credentials as a mediator and mediates dissolutions of marriage which are to be, or have been, filed in Montana courts and disputes which have been filed in Flathead County Justice Court.
4. O'Neil previously was licensed to practice law before the Confederated Salish and Kootenai (CS&K) Tribal Court System.
5. COUPL and the State Bar are alter egos of each other.
6. With the intent to put O'Neil out of business the State Bar informed the CS&K Tribal Court System that O'Neil was not

licensed to practice law before the Blackfeet Tribal Court System. Such information was wrong and defamatory.

7. Because of receiving the wrongful information from the State Bar, the CS&K Tribal Court System terminated O'Neil's license to practice before the CS&K Tribal Court System.

SUMMARY OF ARGUMENT ON APPEAL

The District Court not only ignored most of the evidence favorable to Respondent which was presented at trial and entered in the record (depositions, etc.), but also ignored its own express order entered in this case allowing O'Neil to file his Counterclaim against COUPL and Third-Party Claim against the State Bar *munc pro tunc*. Summary Judgment on these claims was inappropriate.

Moreover, the very basis for COUPL's petition for injunction and contempt, MCA §§37-61-201, 37-61-210, and COUPL rules and court-rulings made pursuant thereto, are constitutionally void for vagueness and over breadth. The over breadth of these statutes and rules requires the strict scrutiny of this Court's review, because of the potential impact and undue burden they place upon specifically protected, right of privacy and enumerated fundamental rights of freedom of expression, association, and petition under the First Amendment. Also, the Montana Supreme Court exceeds its Constitutional authority when it promulgates and enforces COUPL Rule 2(h) over the general public when they are not under the jurisdiction of the courts.

COUPL has sought a finding of criminal contempt (regardless of penalties requested) and a permanent (i.e. lifetime) injunction (i.e. prior restraint) against Appellants' First Amendment rights of freedom of speech, expression, association, petition and privacy, without showing any injury whatsoever, much less irreparable injury, and no showing that Appellants' exercise (outside the courtroom) of their First Amendment rights to freedom of speech, expression,

association, petition and privacy has created, or might in the future create, a clear and present danger of harm to any person or entity.

The District Court failed to consider if its injunction against Appellants was an invasion of the enumerated First Amendment and "penumbral" privacy rights of Appellants when strict respect for the privacy rights of any professional's clients is secured in Montana by ***Armstrong v. State***, 1999 MT 261, 296 Mont. 261, 989 P.2d 364 (Mont. 1999). O'Neil asserts his right to represent his clients' interests under ***Armstrong*** in the present case. The fundamental enumerated rights expressly protected by the First Amendment should be afforded at least as much substantive due process protection as allowed to unenumerated rights in ***Lawrence and Garner v. Texas***, 539 U.S. 558 (2003).

Because the question whether O'Neil "engaged in the unauthorized practice of law" is a mixed question of law and fact, O'Neil is entitled to a jury trial on this issue under ***U.S. v. Gaudin***, 515 U.S. 506 (1995) and its progeny over the past ten years which require that every element of a criminal offense including punishment must be tried to a jury. O'Neil contends the rule of ***Gaudin*** is particularly applicable when the criminal contempt sanctions sought involve an indefinite, possibly lifetime prohibition on exercise in certain communicative and expressive activities protected by the First Amendment as a matter of fundamental rights.

ISSUES REQUIRING REVERSAL

I. O'NEIL'S *COUNTER-CLAIM* WAS FILED IN A TIMELY MANNER AND SHOULD BE REINSTATED.

1. Respondents are the Montana Supreme Court Commission on Unauthorized Practice of Law which is hereafter referred to as "COUPL" and Third-Party Respondent, the Montana State Bar Association which, is hereafter referred to as the "State

Bar" (O'Neil contends that for all practical purposes, the COUPL is identical in interest and standing in this case to the state bar).

2. In their Petition seeking to have O'Neil charged with contempt of court and enjoined from helping his customers access the courts, Respondents alleged that O'Neil failed to file his counter claim in a timely manner pursuant to Rule 14, M.R.Civ.P. But O'Neil had the Court's express permission for late filing rendered orally from the bench, as well as Petitioner's and Third-Party Respondent's agreement (also announced orally in court) to the filing of the *Counter-Claim.*

3. Moreover, even before this date, on August 2, 2002 O'Neil filed his *Answer to Petition and Demand for Jury Trial.* Appellants' counterclaim against COUPL/Third-Party Claim against the State Bar was incorporated (as allowed by the Rules of Procedure) in O'Neil's original answer of August 2, 2002. Respondents were expressly put on notice of the Cross-claim in O'Neil's *Prayer for Relief* at page 5 of the answer where O'Neil stated:

> Respondent objects to the relief sought based on the lack of specificity in the Petition, the arguments of Respondent contained above and as all information to be disclosed in discovery. **Respondent also incorporates his Cross-claim, and the determination of the jury in that cause at this point by reference as additional authority.** (emphasis added).

and in the *Conclusion* at page 6:

> Respondent respectfully prays the Court for the following relief:
>
> - - -
>
> 2. For all the relief requested in the Cross-claim to be filed in this cause to be incorporated by such filing in this Response by reference;

4. On November 19, 2002 O'Neil filed the *Counter-Claim* with the clerk and had a *Summons* issued. The Respondents were duly served.

5. On December 11, 2002 Respondent State Bar answered the Cross-claim and on December 16, 2002 Respondent UPL answered the Cross-claim. In their answers, Respondents alleged that O'Neil's Counter-Claim was not filed timely as per M.R.Civ.P., Rule 14.

6. At the October 28, 2004 pretrial conference and hearing on their motions for summary judgment, Respondents agreed not to pursue their Rule 14 claim and to allow O'Neil to file his *Counter-Claim* retroactively. (Tr, pg 5, ln 15 - pg 7, ln 8):

> MR. O'NEIL: Your Honor, the – we did a counterclaim after they filed their motion for – and in our counterclaim we allege they're both the same – for purposes of this suit they're both the same entity. And we believe that. And they're denominated as a third-party complaint, but it's not – I don't believe it's a third-party complaint. It's a counterclaim. And because they have a motion there to have it dismissed because it doesn't meet the rules of civil procedure as a third-party complaint, needs to be served within 30 days after the action is served on us, and that as a counterclaim I don't believe it meets that procedure rule.
>
> If it does meet that procedure rule at the time we still have a cause of action against the State Bar – against the – because of John Conner's publication, which defamed our potential clients, and we have only been able to prove that in the last, about a week, which I believe that action would still be good for a while.
>
> So it would conserve the resources of the Court to go ahead and if – I don't believe we need to have a special rule from the Court to serve that counter-complaint. But if we do I would request the Court to give us one retroactive in order to conserve the resource

of the Court so we don't have to go back and litigate it over again.

As far as the –

THE COURT: If that's an issue before the Court, then, Mr. Berg, Mr. Hawkins, do you wish to take a position on that?

MR. BERG: Judge, for the State Bar, it is an issue. It is purely procedural. We are way down the line for it. We are approaching trial. We don't want to make it a substantive issue. We don't want this case to ride on that and find ourselves here in six months.

THE COURT: So you object to the filing?

MR. BERG: I will not object to what he is basically asking of us, which is that we waive the –

THE COURT: 30 days.

MR. BERG: Yes.

THE COURT: All right. And then, Mr. Hawkins?

MR. HAWKINS: I'd agree.

THE COURT: And, sir, based on the lack of objection from the other two parties, then, I will allow you to file the document that you wish to file.

7. The Court wrote a minute entry wherein it instructed "The Court will allow Mr. O'Neil to file all documents he wishes to file with no objection from Mr. Berg or Mr. Hawkins." (Ex A)

8. As agreed to at the hearing, O'Neil filed his *Counter-Claim nunc pro tunc* as of 8/30/2002." (Exhibit B) As evidenced by page 3 of the *Case Registry Report* in DV-15-2002-378-B, this motion was filed on November 4, 2004. (Exhibit C)

9. In spite of its prior ruling, the Court's *Findings of Fact, Conclusions of Law, and Order Regarding State Bar of Montana's Motion for Summary Judgment*, dated November 15, 2004, erroneously and improperly ruled *sua sponte* (without motion or other request from the affected parties respondent) that:

Petitioner's Petition for Finding of Civil Contempt and for Permanent Injunction against O'Neil was filed July 15, 2002. O'Neil's Answer to the Petition and Demand for Jury Trial was dated August 2, 2002. Later, on November 19, 2002, without requesting leave of Court or Parties, O'Neil filed his Third Party Complaint against the Montana State Bar Association and Petitioner. (¶ 13, pg 4)

O'Neil's Third Party Complaint was filed more than 30 days after Petitioner's Complaint was filed." (¶ 14, pg 4)

O'Neil's Third Party Complaint was filed more than two years after the event triggering this action, namely, the initial Brandborg letter to US West Dex on November 15, 2000." (¶ 15, pg 4)

10. The District Court's finding that O'Neil's "Third Party Complaint" was filed more than 30 days after Petitioner's Complaint ignores the Court's express (and unopposed) grant of permission for O'Neil to file the *Counter-Claim nunc pro tunc*. *Cf.*, ***Association of Unit Owners v. Big Sky***, 224 Mont. 142, 729 P.2d 469, (1997).

11. The District Court's *Findings of Fact* ignores that on December 5, 2000, State Bar Counsel Betsy Branborg improperly and improperly notified the CS&K Tribal Court, by a telephone conversation, that O'Neil was not an attorney member of the Blackfeet Tribe. This is evidenced by Brandborg's telephone notes. State Bar's Exhibit C. The published material was false."

12. The District Court's finding that O'Neil's "Third Party Complaint" transpired more than two years after the event triggering this action, and that was the initial Brandborg letter to US West Dex on November 15, 2000, fails to fails to consider Brandborg's December 5, 2000 phone call to Robert Stahl, Law Clerk of the Confederated Salish & Kootenai Tribal Court, wherein the State Bar wrongfully notified the CS&K Tribal Court that O'Neil was not licensed as an attorney in the

Blackfeet Tribal Court.

13. A time line on these actions is:

ACTION	DATE	DAYS FROM TORTIOUS ACTION	DAYS FROM ANSWER TO PETITION
Bar Counsel informs US West Dex by letter O'Neil is not an attorney	Nov 15, 2000		
Bar Counsel informs CS&K Tribal Court by telephone O'Neil is not an attorney with Blackfeet Tribe	Dec 5, 2000	Last date of alleged tortious action?	
John P. Connor Jr's letter defaming O'Neil appears in *Daily Inter Lake*	6/4/2002	Might be tortious action	
Petition for Finding of Civil Contempt and for Permanent Injunction	Jul 15, 2002	587 days	
O'Neil's answer to petition and demand for jury trial and notice of counter claim	Aug 2, 2002	625 days (18 days after filing of petition)	

O'Neil's Counter-Claim (*nunc pro tunc* with Court's permission)	Aug 30, 2002	653 days	28 days
O'Neil's Counter-Claim (actually filed & summons issued)	Nov 19, 2002	714 days	109 days

II. IT WAS AN ABUSE OF DISCRETION AND CLEAR ERROR FOR THE LOWER COURT TO ENTER A PARTIAL SUMMARY JUDGMENT WHEN THE EVIDENCE PRESENTED AT THE HEARING, AND BY AFFIDAVIT AND DEPOSITION REVEALED CONFLICTS AND CONTRADICTIONS IN THE EVIDENCE AMOUNTING TO GENUINE ISSUES OF MATERIAL FACT.

On December 5, 2000, Betsy Brandborg as an agent for the State Bar of Montana, improperly notified the CS&K Tribal Court, by telephone, that O'Neil was not an attorney member of the Blackfeet Tribe. This is evidenced by Brandborg's telephone notes. *State Bar's Exhibit C*. The published material was false.

In the *Counter-Claim* O'Neil pled conspiracy and advanced claims against Respondents for: Defamation Involving Profession, Tortious Interference with Contract, and Privacy. Respondents moved for summary judgment. In response thereto, O'Neil presented affidavits showing he is licensed as an attorney with the Blackfeet Tribal Court (Exhibits _____).

The District Court ignored these affidavits properly offered into evidence on the record and declared:

> The undisputed facts establish that O'Neil is not an attorney licensed by the State Bar of Montana or any Tribe in Montana."

Findings of Fact, Conclusions of Law and Order Regarding Montana State Bar's Motion for Summary Judgment, p. 5, ln. 15).

This finding is clearly erroneous. The undisputed facts clearly show that O'Neil was, and continues to be, licensed as an attorney with the Blackfeet Tribal Court! This is even confirmed in the transcript of the bench trial at pg 359, lns 1 - 4, wherein the Court states:

> You've indicated and provided proof to the court that the Tribal – the Blackfeet Tribal Court does authorize you to appear before them as an advocate and a counselor.

Contrary to the allegations of the opponents, being an "advocate and counselor" within the jurisdiction of the Blackfeet Tribal Court is equivalent to being an "attorney" outside of the tribal court jurisdiction. According to ***Black's Law Dictionary, Fifth Edition***, an "advocate" is:

> One who assists, defends, or pleads for another. One who renders legal advice and aid and pleads the cause of another before a court or a tribunal, a counselor. A person learned in the law, and duly admitted to practice, who assists his client with advice, and pleads for him in open court. An assistant; adviser; a pleader of causes.

Also according to ***Black's Law Dictionary, Fifth Edition***, a "Counsellor" is:

> An attorney; lawyer. Member of the legal profession who gives legal advice and handles the legal affairs of client, including, if necessary, appearing on his or her behalf in civil, criminal, or administrative actions and proceedings.

Evan Danno is licensed to practice law within the State of

Montana and before the Blackfeet Tribal Courts. It was established at trial that his authority to practice before the Blackfeet Tribal Court is the same as O'Neil's and that O'Neil functions as a full attorney before the tribal court (Tr, pgs 317 - 320). As evidenced by the October 8, 2004 *Affidavit of Jerry O'Neil* and the September 27, 2004 *Affidavit of Evan F. Danno*, O'Neil's license as an Advocate and Counselor with the Blackfeet Tribe is the same as Evan Danno's license with the Blackfeet Tribe. Their licenses give them both the right to represent and plead for clients in open court and subject them both to the authority of the Blackfeet Tribal Court.

Summary judgment is only proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law:

> **Rule 56(c), M.R.Civ.P. Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

O'Neil is entitled to ask a jury to find, as a matter of fact, that---because he is a licensed attorney authorized to practice in Blackfeet Tribal Court---Petitioner and Counter-Defendants wrongfully interfered with his right to practice before the Confederated Salish and Kootenai Tribal Court. As this Montana Supreme Court has previously explained:

> As this Court has firmly acknowledged, summary judgment "was not intended nor can it be used as a

> substitute for existing methods in the trial of issues of fact . . . ." . . . .The very purpose of summary judgment is to determine whether any genuine issues of material fact exist. See Rule 56(c), *M.R.Civ.P.* However, it is not the function of a trial court to adjudicate genuine factual issues by way of summary judgment. In this case, the District Court improperly resolved a disputed issue of material fact on a summary judgment motion when it should have instead deferred the determination of that issue to the trier of fact at trial.

In Re Estate of Kuralt, 294 Mont. 354, 981 P.2d 771 (Mont.1999)(citations omitted).

III. WHEN DEMAND WAS PROPERLY MADE IN THIS CASE, THE MIXED QUESTIONS OF LAW AND FACT SHOULD HAVE BEEN RESERVED TO THE JURY AS A MATTER OF RIGHT.

When the District Court wrongly dismissed O'Neil's Counter-Claim against COUPL and State Bar, besides denying Appellant the recovery he is entitled, it wrongly decided the case was one of equity and ruled that O'Neil would not receive a jury trial. Appellant believes the case against him is for criminal contempt. He also believes the Counter-Claim should be reinstated.

In this case, "engaging in the unauthorized practice of law" is a mixed question of law and fact, relevant to the determination of a criminal contempt under Montana Law (criminal because it relates to punishment for past conduct – whether or not fines or prison time were actually imposed).

The District Court's order below serves SOLELY and EXCLUSIVELY to vindicate the authority of the Court, and the contempt proceedings against O'Neil were thus criminal in

nature. As the United States Supreme Court explained in ***Hicks v. Feiock***.

> - - the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."(*citations omitted)*).

485 U.S. 624, 629-632 (1988).

Since the *Judgment and Permanent Injunction* states "an injunction would enforce the responsibility of the Supreme Court to maintain the professionalism of the practice of law", the contempt entered against O'Neil is criminal. It was entered in violation of due process of law as construed by the Supreme Courts of Montana and the United States.

O'Neil is under a THREAT of jail-time as a result of the"injunction" and "RETENTION OF JURISDICTION" (emphasis by capitalization in the original) "for enforcement of the judgment and injunction, and for punishment of any violation of its terms". *Judgment and Permanent Injunction* of January 7, 2005, Page 10. Such retention of jurisdiction is the same as placing a criminal defendant on "probation" or "supervised release" subject to immediate arrest and jail time for violation of the conditions of probation with a reduced standard of evidentiary proof.

The Court's order should also be vacated because it violates the mandate of ***Huffine v. District Court***, 285 MT 104, 945 P.2d 927, 54 St. Rep. 1065 (Mont. 1997), that,

> - - - prosecution for criminal contempt must be carried out pursuant to the procedures set forth in Title 46, MCA, to ensure that criminal penalties are not

imposed on someone who has not been afforded the proper protections.

O'Neil has been found in contempt for PAST acts and been put on indefinite, possibly lifetime, "probation" over which the Court expressly retained jurisdiction, reserving the right to impose criminal contempt sanctions for violation. O'Neil has been deprived of his liberty without due process of law within the terms of this Montana Supreme Court's decision and opinion in ***Huffine***.

According to the U.S. Supreme Court in ***United States v. Gaudin*** (94-514), 515 U.S. 506 (1995), the assessment of punishment (the most important of all "mixed questions" of fact and law) in every kind of criminal proceeding goes to the jury, (e.g. ***Ring v. Arizona***, 122 S.Ct. 2428, [2002]).

> (T)he application-of-legal-standard-to-fact sort of question posed by (c), commonly called a "mixed question of law and fact," has typically been resolved by juries. ... . Indeed, our cases have recognized in other contexts that the materiality inquiry, involving as it does "delicate assessments of the inferences a 'reasonable [decision maker]' would draw from a given set of facts and the significance of those inferences to him . . . [is] peculiarly on[e] for the trier of fact.". . . (citations omitted).

U.S. v. Gaudin, 515 U.S. at 508.

While ***Gaudin*** was an ordinary criminal case, Justice Scalia's opinion drew on a tradition of "mixed questions" derived primarily from civil cases, e.g. ***T.S.C. Industries v. Northway***, 426 U.S. 438 (1976).

In ***Breese v. Steel Mountain Enterprises***, a Montana case involving mixed questions of law and fact the District Court

granted plaintiffs' motion for a new non jury trial, ruling that an action under Title VII of the federal Civil Rights Act of 1964 is equitable in nature and implies no right to a trial by jury. The Supreme Court found that the record disclosed that plaintiffs submitted evidence of damages other than back pay and reinstatement and concluded that a claim for relief under the Act and a legal claim for damages as a result of unlawful discharge were tried in a single proceeding, each claim arising out of common fact issues. The Montana Supreme Court approved and adopted the reasoning contained in ***Lincoln v. Board of Regents of Univ. System*** (11th Cir. 1983), 697 F.2d 928, 934, cert. denied, 464 U.S. 826 (1983):

> An action for reinstatement and back pay under Title VII is by nature equitable and entails no rights under the seventh amendment. An action for damages under § 1981, however, is by nature legal and must be tried by a jury on demand. When legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both. When a party has the right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim (citations omitted).

Breese v. Steel Mountain Enterprises (1986), 220 Mont. 454, 716 P.2d 214, 216 (1986)(citations omitted).

IV. MCA §§ 37-61-201; 37-61-210; RULE 2(H), RULES OF THE COMMISSION ON UNAUTHORIZED PRACTICE OF LAW, THE COURT'S "INDICIA OF THE PRACTICE OF LAW"; AND THE JUDGMENT AND PERMANENT INJUNCTION BASED ON THESE STATUTES AND INDICIA ARE OVERBROAD AND UNCONSTITUTIONALLY VAGUE.

The Lower Court's *Judgment and Permanent Injunction* forbids O'Neil from taking any acts or actions or other "things as are usually done or performed by an attorney at law in the practice of his profession" to use the language of MCA § 37-61-201 on which the Court based its "definition" of the practice of law. Page 9, ¶2.

An injunction must be sufficiently precise that a reasonable person can understand its terms and conform itself to its parameters, but the Court's order is neither precise nor comprehensible to a reasonable person. The phrase "things usually done or performed by an attorney at law in the practice of his profession" is vague rather than precise, subjective rather than objective, and utterly insufficient to support an injunction, much less the threat of criminal contempt for violation of that injunction.

On the one hand the Court has permitted Appellant to do every "particular act" he wants to do except to advertise his standing in the Blackfeet Tribal Court or his membership in the Montana State Bar's Section on Family Law in the Yellow Pages. On the other hand he cannot do any of the things he has been doing for many years because each act or action involved in his "business activities" (except being a Montana State Senator) may constitute "indicia of the practice of law".

According to the District Court, two indicia that O'Neil is unlawfully practicing law are "The giving of advice or counsel

to others as to their legal rights or responsibilities or the legal rights or responsibility of others" (Judgment, pg 9, ¶ 3(a)) and "Negotiating the legal rights or responsibilities of others".

But then the District Court contradicts itself by saying: "Whether or not [it] constitute[s] the practice of law, the following [is] permitted: - - Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator without practicing law" (Judgment, pg 10, ¶5(c))" and "Nothing in this judgment shall affect the ability of the Respondent to provide information of a general nature about the law and legal procedures to members of the public" (Judgment, pg 10, ¶ 5(g)). And then, to top it off, the District Court states: **"These indicia are not all-inclusive, but are factors that the court may consider**."

The injunction is inappropriate because "the indicia of the practice of law" itemized by the Court," is too vague, too broad, and too all-inclusive. It includes all of Appellant's "business activities," including Justice Court mediations, family dissolution mediations and Tribal Court attorney practice; not to mention the other factors the District Court hasn't thought about yet but reserves for its consideration when they come to its attention.

Regarding the unauthorized practice of law, Montana Codes and Supreme Court Rules provide:

> **MCA § 37-61-201. Who considered to be practicing law.** Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession for the purposes of parts 1

through 3 of this chapter shall be deemed practicing law.

Rules of the Commission on Unauthorized Practice of Law, RULE TWO. DEFINITIONS -- 2(h). Unauthorized Practice of Law. "Unauthorized Practice of Law" means the practice of law without being first duly qualified, as prohibited by statute, court rule, or case law of the state.

MCA § 37-61-210. Penalty for practicing without license. If any person practices law in any court, except a justice's court or a city court, without having received a license as attorney and counselor, he is guilty of a contempt of court.

The two definitions of the practice of law given above, i.e. MCA 37-61-201 and COUPL, Rule Two, Definition 2(h), are too overbroad and unconstitutionally vague to impose any restriction on Appellant's liberty, and are insufficient to support the Court's finding of criminal contempt and entry of *Judgment and Permanent Injunction* against O'Neil. Further, these definitions are totally insufficient to serve as a guide for O'Neil's future conduct and afford him no due process of the law.

The above definitions--which are both based on and require the resolution of mixed questions of law and fact, especially as applied and integrated into the Court's "Judgment and Permanent Injunction" (page 9, ¶2) do prohibit or restrict O'Neil from engaging in constitutionally protected activities.

V. THE SUPREME COURT, DISTRICT COURT AND COUPL EXCEEDED THEIR JURISDICTION WHEN THEY CREATED AND INTERPRETED MCA §§ 37-61-201, 37-61-210

AND RULE 2(II), RULES OF THE COMMISSION ON UNAUTHORIZED PRACTICE OF LAW TO APPLY MEMBERS OF THE GENERAL PUBLIC WHO ARE NOT UNDER THE COURT'S JURISDICTION.

COUPL Rule h(2), defining the unauthorized practice of law, is less precise, more vague, and subject to an even broader construction) than MCA § 37-61-201 and, if enacted by the legislature, it would be subject to strict scrutiny and be found in violation of fundamental guarantees of substantive and procedural due process. COUPL Rule h(2) exceeds the authority given to the Montana Supreme Court by the Montana Constitution. Within the courtroom the Montana Supreme Court has been given authority over those who practice law by our 1972 Montana Constitution under Art. VII, Sec. 2(3):

> [The Supreme Court] may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members.

The Montana Constitution does not give the Supreme Court any rule-making authority over CPA's, real estate agents or others outside of a court setting. It may not define, limit, or infringe upon the fundamental rights enumerated in the Montana and the United States constitutions which are at stake in the present case.

The "practice of law" is in fact not a single category of behavior or employment, but an umbrella term encompassing an extremely wide variety of activities -- some of which are specialized and technical (such as the definition, differentiation, and evaluation of "high tech" patents), and some of which are a matter of common sense and everyday experience (such as the formation and interpretation of a contract for the sale of retail

goods). The phrase quoted is obviously both imprecise and incomprehensibly vague and simultaneously overbroad. Appellant suspects that might explain why MCA § 37-61-210 only applies the penalty to one who "practices law in - - court".

Outside of the courtroom the regulation of business was left with the Legislature under Article V, Section 1:

> Power and structure. The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum.

Under this authority the legislature makes rules for the regulation of many occupations, including many where those regulated "engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession." Some of these professions include: pharmacists, morticians, real estate brokers, private investigators, architects, and land surveyors. All these professions advise their clients regarding specific laws. An occupation that lends itself well to this argument is public accountancy.

Few would doubt, for example, that the IRS code is better understood and applied by CPAs than by the vast majority of licensed attorneys. Accountants routinely advise their clients regarding the legality of treatment of income and liabilities for tax purposes under the most complex subdivision of Federal Tax law. There is no doubt that accountants select, draft, and complete tax returns "which affect the legal rights or responsibilities of others."

Under ***Papachristou v. City of Jacksonville***, 405 U.S. 156 (1972) MCA 37-61-201 and COUPL Rule 2(h) are unconstitutional and void for vagueness, as well as being overbroad. A statute is overbroad on its face if it prohibits constitutionally protected activity, in addition to activity that

may be prohibited without offending constitutional rights. ***Grayned v. City of Rockford***, 408 US. 104, 114 (1972). Thus, the overbreadth doctrine departs from traditional rules of standing to permit, in the First Amendment area, a challenge to a statute both on its face and as applied to the defendant. ***Broadrick v. Oklahoma***, 413 US. 601, 612 (1973). The underlying reason for allowing a defendant to challenge a statute on its face, even when the defendant's own conduct may be constitutionally prohibited, is the potential chilling effect that overbroad statutes have on the exercise of protected speech. ***Board of Airport Comm'rs v. Jews for Jesus, Inc.***, 482 U.S. 569, 574 (1987).

COUPL, Rule 2(h) and MCA 37-61-201 are each unconstitutionally vague and overbroad on their face and as applied to O'Neil.

VI. THE DISTRICT COURT EXCEEDED ITS LAWFUL AUTHORITY AND ABUSED ITS DISCRETION BY ENTERING AN INDEFINITE INJUNCTION BASED UPON SPECULATION.

The Court below implicitly acknowledges the *Judgment and Permanent Injunction* is not specific in its terms and does not describe the acts to be restrained in reasonable detail. (Judgment, p. 10: "Retention of Jurisdiction").

> This Court will retain jurisdiction of this matter for the purpose of any party to apply for clarification or for direction. Jurisdiction is retained for modification of the injunction. Jurisdiction is retained for enforcement of the judgment and injunction, and for punishment of any violation of its terms.

Judgment and Permanent Injunction dated January 7, 2005, at pg 10.

But, an injunction must be sufficiently precise that a reasonable person can understand its terms and conform itself to its parameters, but the Court's order is neither precise nor comprehensible to a reasonable person. Specificity in the terms of consent decrees is a predicate to a finding of contempt. ***Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.***, 689 F.2d 885, 889 (9th Cir. 1982), while the phrase "things usually done or performed by an attorney at all in the practice of his profession" is vague rather than precise, subjective rather than objective, and utterly insufficient to support an injunction, much less the threat of criminal contempt for violation of that injunction.

> An injunction must be "specific in terms" and describe "in reasonable detail" the acts sought to be restrained. Fed. R. Civ. P. 65(d). Specificity in the terms of consent decrees is a predicate to a finding of contempt (*citations* omitted).

Gates v. Shinn, 98 F.3d 463 (9th Cir. 10/16/1996).

> Under MCA § 27-19-105,
>
> An order granting an injunction or a restraining order shall:
>
> (1) set forth the reasons for its issuance;
>
> (2) be **specific in its terms**;
>
> (3) **describe in reasonable detail, and not by reference to the complaint or any other document, the act or acts sought to be restrained**; and
>
> (4) be binding only upon the parties to the action; their officers, agents, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. (emphasis added)

The definitions of the practice of law articulated in MCA 37-61-201, R.Com.UPL 2(h), and the Court's *Judgment and Permanent Injunction* based thereon, simultaneously share the "indefinable" character and suffer from the same constitutional infirmity perceived by the late Justice Potter Stewart in the U.S. Supreme Court's definition of hard-core pornography:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184 (1964)(concurrence).

Appellant puzzles over the Court's *Judgment and Permanent Injunction* and submits that the terms of ¶¶ 1 and 5 on pages 9-10 of the order may be abstracted as follows:

> Respondent may not engage in the practice of law, -- [but].... Whether or not they -- constitute the practice of law, [Appellant may] act[] as a lay representative..., serv[e] in a neutral capacity as a mediator....without practicing law, [do anything else] that the Supreme Court has determined by published opinion do[es] not constitute the unlicensed or unauthorized practice of law [and] provide information of a general nature about the law and legal procedures to members of the general public.

The last phrase of this abstract is a direct quote from the Court's *Judgment and Permanent Injunction* on page 10, ¶5.g., which states:

> Nothing in this judgment shall affect the ability of Respondent to provide information of a general nature about the law and legal procedures to members of the

public.

Appellant submits that he is probably the only attorney licensed in a jurisdiction other than Montana who has ever been enjoined from providing information of a specialized nature about the law and legal procedures to members of the Montana public. Title 25 of the United States Code and the Commerce Clause, the Full Faith and Credit Clause, and the Supremacy Clause of the U.S. Constitution, all require state courts to give full faith and credit to the acts of the Indian tribes as they would the acts of any other state or the federal government Title 25 requires State Courts afford "full faith and credit to public acts, records, and judicial proceedings of Indian tribes" with regard to Tribal Court determinations of all matters touching upon child custody, divorce, and family law proceedings. 25 U.S.C. §1911(d). The United States Supreme Court held in ***Montana v. United States***, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981): "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements."

The public acts, records and judicial proceedings of the Blackfeet Indian Tribe determine that O'Neil is licensed to practice family law on the Blackfeet Indian Reservation. Under "full faith and credit", shouldn't Montana allow O'Neil the same right to discuss legal matters with the public as is given to other out-of-state attorneys when they are present in the state.

Montana courts should also admit O'Neil on application *pro hac vice* the same as they would admit any other out-of-state attorney. O'Neil, informing the Court that he was licensed to practice before the Blackfeet Tribal Courts, petitioned the Flathead County District Court, Judge Kitty Curtis presiding, for permission to represent Ernest Wilcock in a dissolution of marriage proceeding (***In Re the Marriage of Wilcock***, DR-97-

486(B)). If he had been licensed to practice law in any of the 49 other states he would have been perfunctorily admitted to help Wilcock *pro hac vice*. Instead of O'Neil being admitted to represent Wilcock, Judge Curtis denied his motion, but allowed O'Neil to sit with Wilcock at the council table, confer with him about the case, and prepare documents for him to file with the Court. The Court specifically found that these actions did not constitute the practice of law:

> But you're welcome to represent yourself. You're welcome to have Mr. O'Neil advise you. He can prepare documents for you. He knows what practicing law is, what practicing law isn't, and so, you know, he can advise you. He can't speak for you. But you strike me as someone who is fairly capable of speaking for himself.

Exhibit B-1, page 11, lines 3-8 of the Deposition of Katherine R. Curtis, District Court Judge, Eleventh Judicial District Cause No. DR-97-536(B)

There is a fundamental right to access the courts. This right has been found to exist for prisoners in ***Johnson v. Avery***, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (February 24, 1969) and ***Bounds v. Smith***, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72. As explained in ***Lewis v. Casey***, 518 U. S. 343 (June 24, 1996):

> Bounds did not create an abstract, free-standing right to a law library or legal assistance; rather, the right that Bounds acknowledged was the right of access to the courts. E.g., 430 U.S. at 817, 821, 828. Thus to establish a Bounds violation, the "actual injury" that an inmate must demonstrate is that the alleged shortcomings in the prison library or legal assistance program have hindered or are presently hindering, his efforts to pursue a non-frivolous legal claim.

Those seeking a divorce also have a constitutionally

protected right to access the courts. ***Boddie v. Connecticut,*** 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (March 2, 1971).

Ernest Wilcock was incarcerated in the Flathead County jail on a felony violation when his wife sued him for dissolution of their marriage. The divorce case went in front of the Honorable Katherine Curtis, District Judge of the Eleventh Judicial District.

Wilcock was a pauper. The court would not appoint an attorney for him and Wilcock was unable to find one that would take the dissolution case on a pro bono basis. The only help he could find was O'Neil.

How can Judge Christopher find that O'Neil's actions ***In Re the Marriage of Wilcock***, DR-97-486(B), which were done under the authority of the *Wilcock* court, and protected under the tenet of ***Bounds v. Smith,*** constitute the unauthorized practice of law when those actions were specifically authorized by Judge Curtis in the court where those actions took place?

Judge Christopher also found that just O'Neil's petitioning to the courts for permission to help Karen Sparks in the Whitefish City Court (***Sparks v. Johnson***, 252 MT 39, 826 P.2d 928, 49 St. Rep. 124 (MT 1992) constituted the unauthorized practice of law.

Opponents' own expert, Mr. Mike Alterowitz, when addressing this, answered O'Neil's questions as follows:

Q. Okay. If I were to have filed papers asking the court to let me appear as a non-attorney, would that be appearing in a court?

A. To let you appear as a non-attorney?

Q. Yeah.

A. I guess you are, at that point, asking the court for permission to appear. So in that situation, that limited kind of document is probably not such an appearance.

Q. Thank you.

A. Because it's respecting - - The point there is it's respecting the authority of the court. It's saying, I respect the authority of the court to determine who may appear before it, and it's ceding to that authority. And in my mind, that's very appropriate. That is exactly what we all need to do is to cede to that authority.

Deposition of Mike Alterowitz, page 58, line 17 - page 59, line 8

VII. SANCTIONS FOR CRIMINAL CONTEMPT INVOLVING EXPRESSIVE OR COMMUNICATIVE ACTIVITIES AND PROTECTED PRI-VACY MAY ONLY BE IMPOSED ACCORDING TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS PROTECTIONS WHICH ARE REVIEWED UNDER THE HIGHEST STANDARD OF STRICT SCRUTINY.

The United States Supreme Court has addressed the power of courts to punish and censure parties under the "inherent" power of courts to impose "criminal contempt [wherein] the sentence is punitive, to vindicate the authority of the court" on many occasions, notably in the 1940s with a triad of cases starting with ***Bridges v. California***, 314 U.S. 252 (1941). The question in ***Bridges*** was the right of the press to criticize the courts set against "the power to punish for publications made outside the court room if they tend to interfere with the fair and orderly administration of justice in a pending case." 314 U.S. at 259.

There is nothing more to the District Court's asserted power to "enforce the responsibility of the Supreme Court to maintain the professionalism of the practice of law" (Page 8, ¶5) than there was to California's Courts' attempt to silence the

Times-Mirror corporation in Los Angeles County.

The difference between ***Bridges*** and the present case is merely a difference of occupational identity which is not constitutionally significant. Appellant, like Bridges, is not a licensed attorney. The alleged threat is the same. California alleged that Bridges' (e.g. the Los Angeles Times') publications, would subvert the legal process through intimidation of the courts to reach a particular outcome in favor of a particular party to a pending lawsuit. Montana has not stated what harm it fears might come from O'Neil's activities, and COUPL has not alleged any harm, so the perceived "injury" from Appellant is merely to the enforcement of the Court's own unconstitutionally vague and overbroad rules. In short, the State of California had a much stronger case against Bridges than Montana has against O'Neil.

Like the publications in ***Bridges***, Montana's attempts to punish Appellant for his actions are not based on legislatively enacted statutory "restriction on a particular kind of utterance". Nor has

> the legislature of [Montana] appraised a particular kind of situation and found a specific danger sufficiently imminent to justify" ... "a restriction on liberty of expression, the public interest in that liberty [being] properly subordinated to the public interest in judicial impartiality and decorum." 314 U.S. at 259-62.

Montana's legislative prohibition in MCA §§ 37-61-201 and 37-61-210, against non-lawyers engaging, as Appellant allegedly has done, "in the business and duties and perform[ing] such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession" is based on a "judgment" of the most general and undefined nature. Id. at 260 (citations omitted). "The likelihood, however great, that a substantive evil will result cannot alone justify a restriction

upon freedom of speech or the press." Id. at 262.

The application of the ***Bridges v. California*** approach to contempt involving expressive and communicative activities relating to the honor and integrity of the court system was reaffirmed and expanded in two subsequent cases: ***Pennekamp v. State of Florida***, 328 U.S. 331 (1946) and ***Craig v. Harney***, 331 U.S. 367 (1947) (arising in Texas). Appellant contends that since they are not prohibiting behavior which has been determined to constitute a clear and present danger to anyone, MCA § 37-61-201 and R.Com.UPL 2(h), are constitutionally infirm and should be declared unconstitutionally vague and overbroad.

An examination of the trial transcript and record in the present case reveals that neither the COUPL alleges, nor the Court finds, that O'Neil's activities caused harm to his clients, who have standing in this action under ***Armstrong v. State***, 1999 MT 261, 989 P.2d 364.

Appellant submits that there is less danger of actual harm of any sort to any person or interest by allowing O'Neil to engage in communicative, expressive, and petitioning actions with and on behalf of his clients than there was in allowing practitioners other than licensed physicians to perform abortions, as is allowed under ***Armstrong***.

> - - [I]t is clear from their debates that the delegates [to the 1972 Montana Constitutional Convention when drafting Art. II, Sec. 10, Montana Constitution] intended this right of privacy to be expansive - that it should encompass more than traditional search and seizure. The right of privacy should also address information gathering and protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each

> individual to make decisions in matters generally considered private.
>
> With this background, and as correctly noted by Judge Sherlock, Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States–exceeding even that provided by the federal constitution. Indeed, since the right of privacy is explicit in the Declaration of Rights of Montana's Constitution, it is a fundamental right. It is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives.
>
> For this reason, legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis-i.e., the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest. [cites omitted]

Armstrong v. State, 1999 MT 261, 296 Mont. 361, 989 P.2d 364

Lawrence v. Texas, 539 U.S. 558 (2003), dealt with the reach of substantive and procedural due process under the Fourteenth Amendment to unenumerated rights, not specified by the Constitution. O'Neil submits that his and his clients expressive, communicative, and associative activities are entitled to the same or greater protection from state interference provided in ***Armstrong*** and ***Lawrence*** precisely because they are communicative, expressive, and associative rights involved in the preparation and presentation of petitions for relief of grievances to the government.

Strict scrutiny should be applied to MCA §§ 37-61-201 and 37-61-210 and to all action taken by the COUPL, State Bar, and District Courts in limiting O'Neil and his clients' First Amendment freedoms. And at the very least, before the Court imposes any lifetime restriction on O'Neil's actions, the mixed questions of law and fact involved should be tried by a jury.

The Court never found, nor did the Commission on the Unauthorized Practice of Law ever present any evidence, that any harm came to O'Neil's clients as a result of O'Neil's failure to "become[] duly authorized." *Judgment and Permanent Injunction*, pg 7, ¶¶4, 5, top of page 9, ¶4, see also page 10, ¶6. The Court skirts the question of whether any injury to the public can be shown when it notes:

> Pecuniary compensation will not restore the harm done to the judicial and legal systems or the harm potentially done to others. Ascertaining the amount of compensation would be impossible. Bringing individual actions to preclude O'Neil's business activities would be extremely difficult and result in a multiplicity of judicial proceedings. An injunction would enforce the responsibility of the Supreme Court to maintain the professionalism of the practice of law.

Judgment and Permanent Injunction of January 7, 2005, Page 8, ¶5.

Appellant submits that "pecuniary compensation will not restore the harm done to the judicial and legal systems or the harm potentially done to others" because, again, NOT ONE IOTA OF EVIDENCE of any harm to the judicial or legal systems was ever adduced at trial, nor did any expert at trial testify regarding "the harm potentially done to others."

Injunctions normally lie only to prevent "irreparable injury", but not "invisible injury."

All that is at stake here, as the Court itself puts it, is "the responsibility [i.e., "the power"] of the Supreme Court to maintain the professionalism of the practice of law." Neither the Commission nor the Court has ever suggested that Appellant O'Neil's activities have"tended' to interfere with justice." ***Bridges***, 314 U.S. at 278:

The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here:

> If I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there is anything that obstructed the administration of justice in any sense that I can possibly give to those words."

Bridges, 314 U.S. at 278-9, (citations omitted).

By most common definitions, the "practice of law" is mostly a matter of discussing issues and forming opinions, talking to clients about their problems, writing, and drafting petitions to the government, all of which activities are generally covered and protected by the First Amendment to the United States Constitution. O'Neil's expressive and communicative acts and activities "whether or not they constitute the practice of law" (*Judgment and Permanent Injunction,* Page 9, ¶5) certainly do not constitute a "clear and present danger" to anyone in Montana or to the authority of the Court. If they are such a danger, how can the District Court allow that "Nothing in this judgment shall affect the ability of the Respondent to provide information of a general nature about the law and legal

procedures to members of the public"? (*Judgment and Permanent Injunction*, pg 10, ¶ 5(g)).

CONCLUSIONS AND PRAYER FOR RELIEF

The requirements of substantive and procedural due process entitle Appellant to ask a jury to examine and determine the facts regarding his exercise of fundamental rights in relation to the court system as a mixed question of fact and law. If this Supreme Court doesn't dissolve the injunction entirely, Appellant prays that it remand the case for a trial by jury in accordance with not less than seventy years of well-established law concerning penalties for contempt imposed as a result of first amendment, expressive, communicative, and petitioning behavior in regards to the Court system and the role of juries in determining both criminal and "mixed" questions of law and fact.

This Court should remand this case to District Court for a jury trial on all issues, including the counterclaim, which was denied in the face of the record of the District Court's own rulings. If a jury finds that no harm has been done to the public, or anyone aside from "duly licensed" competitors, then no injunction, under Montana law should be permitted to lie against the Appellant.

DATE: September 16, 2005

s/ Jerry O'Neil

CERTIFICATE OF COMPLIANCE

The foregoing *Appellants' Opening Brief* is proportionately spaced using 14 point Times New Roman typeface and consists of 9516 words (excluding the cover page, table of contents,

table of citations, certificate of service and this certificate of compliance).

DATE: September 16, 2005

s/ Jerry O'Neil

CERTIFICATE OF SERVICE

Today I served copies of the foregoing *Appellants' Opening Brief* by depositing said copies into the U.S. Postal Service, postage prepaid, addressed to the parties as listed below:

David A. Hawkins, Attorney at Law Commission on Unauthorized Practice PO Box 577 Helena, Montana 59624	Stephen C. Berg, Attorney at Law PO Box 3038 Kalispell, Montana 59903
John Connor UPL Commission PO Box 201401 Helena, Montana 59620- 1401	

DATE: September 16, 2005

s/ Jerry O'Neil

IN THE ELEVENTH DISTRICT COURT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FLATHEAD

COMMISSION ON THE UNLAWFUL PRACTICE OF LAW,

Petitioner,

-vs- CAUSE NO. DV-02-378B

JERRY O'NEIL,

Respondent.

Taken at 327 West Pine Street, Suite 100
Missoula, Montana
Tuesday, June 15, 2004 - 10:04 a.m.

DEPOSITION
OF
MIKE ALTEROWITZ

APPEARANCES

JERRY O'NEIL, 985 Walsh Road, Columbia Falls, Montana 59912,
appearing pro se on behalf of the Respondent.

DAVID A. HAWKINS, Esq., of the Montana State Fund, Insurance Operations Support, P.O. Box 4759, 5 South Last Chance Gulch, Helena, Montana 59624,
appearing on behalf of the Petitioner.

that version. I have an old version. Page 57
Q. Okay. So in 37-67-201 it states, "Any person who shall hold himself out or advertise as an attorney or counselor at law."
Have you seen my advertisement?
A. I believe I have.
Q. Am I holding myself out as an attorney or counselor at law in my advertisements that you've seen?
A. If we are referring to the same advertisement, what I saw, the advertisement said you were an independent paralegal. But I think it goes on to -- again, if we're talking about the same document, it gives some examples of things you can do. I don't think saying -- I mean, I don't think holding yourself out as an independent paralegal is the practice of law.
I just can't imagine how an independent paralegal -- If your customer base understood the limitations of an independent paralegal, would ever have any clients because an independent paralegal, by my understanding, can do very, very little because he or she is not supervised by an attorney.
Q. Okay. But as far as you know, I haven't held myself out or advertised as an attorney?

A. I don't think I've seen anything that says Mr. Jerry O'Neil, attorney.
Q. Okay. And as far as "shall appear in any court of record or before a judicial body," do you know of any cases where I've appeared before a court of record or before a judicial body, referee, commissioner or other officer appointed to determine any question of law or fact?
A. I guess it was my understanding that you have filed pleadings before a court. And I interpret "appear" because it's the way the law interprets appear, you don't have to physically appear if you file pleadings, file documents. That's an appearance. If you've done that, that's an appearance and that would be violative of that statute.
Q. Okay. If I were to have filed papers asking the court to let me appear as a non-attorney, would that be appearing in a court?
A. To let you appear as a non-attorney?
Q. Yeah.
A. I guess you are, at that point, asking the court for permission to appear. So in that situation, that limited kind of document is probably not such an appearance.

Q. Thank you.
A. Because it's respecting -- The point there is it's respecting the authority of the court. It's saying, I respect the authority of the court to determine who may appear before it, and it's ceding to that authority. And in my mind,

that's very appropriate. That is exactly what we all need to do is to cede to that authority.

Q. Okay. This says that a person who should be considered to be practicing law is a person who shall engage in the business and duties and perform such tax matters and things as are usually done or performed by an attorney at law and the practice of his profession for the purposes of parts 1 through 3 of this chapter. Could you tell me what parts 1 through 3 of this chapter are?

A. I probably could just look. I was operating under the belief that we were talking about parts 1 through 3, the licensing authority is licensing disbarment and suspension. So that -- I mean -- And it does say parts 1 through 3.

I'm sure you already know this, but, you know, the way the statutes are broken down are by chapters and parts. And the parts -- part 1 is the licensing authorities, and part 2 is licensing, and